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112 WASHINGTON STREET, BOSTON.

JANUARY, 1855.

ENGLISH

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TO THE SECOND EDITION.

The peculiar importance of the Law of Carriers of Goods and Passengers by Land and by Water, and the great advantage to be derived by the public from a knowledge of its rules and principles as they are applied to existing commercial and social relations, which are dilated upon in the following preface to the first edition of this work, have been promptly acknowledged by the public in the encouragement they have given to the author so soon to prepare a new edition.

In this second edition, the author has taken care that all the authorities on the subject, American and English, should be introduced which have been reported since the first edition was published.

January, 1851.

PREFACE.

It is not thought requisite to tender an elaborate apology for presenting to the public a work upon a subject of so great importance as the Law of Carriers of Goods and Passengers, as it is believed that it must with the public be a desideratum, that a subject of jurisprudence so practical as this, and one so intimately connected with the common and daily concerns of life, should not only be settled as precisely and as uniformly as possible, but should be generally understood. The annals of navigation and commerce, and the records of commercial jurisprudence, attest the importance of the law of common carriers by land and by water, and it is doubted if there is any other branch of this department of jurisprudence which so naturally tends to awaken a desire in the community at large to become enlightened in relation to it. But since the commencement of the present century, and more especially since American inventive genius has rendered the accelerative and reliable agency of *Steam* subservient to the transportation of commodities and of travellers, the legal duties, liabilities, and rights of public carriers of both things and persons, have become subjects of vastly more interest and greater moment, than before this era, was realized, or even generally anticipated.

This era was soon succeeded by the event of the introduction of the expeditious, commodious, and now common means of commercial transportation, and mercable and social intercourse by land; and so instrumental have *Railroads* proved, in combination with the employment of the agency just mentioned, in cementing in this connection and dependence sections of country far removed from each other, that the interest of the mercantile and travelling public, and more especially of the legal profession, in the direction of the subject of the following work, has attained its *acme*. And yet, the only works professing to treat of the subject, and devoted entirely to its exposition, which the author has been able to meet with, are two productions by English authors, one by Jeremy, and the other by Jones,[1] the first of which appeared in the year 1815, and the other in the year 1827.

It must be obvious, that neither of these productions is at all adequate to answer present wants, whatever merit may be justly ascribed to them, and however valuable they may have been at the time of their publication. The late learned Mr. Justice Story, in his well known and highly valued "Commentaries on the Law of Bailments," has indeed treated upon the subject, but then he has done so by considering it only as a branch of his general subject, and of course his exposition of the Law of Carriers is not nearly so comprehensive and satisfactory as it would have been, had he considered it independently or by itself.

The object of the author has been to consider the law on the subject proposed as it now is, and at the same time to point out such discrepancies as he has discovered to have occurred, in the course of the gradual adaptation, by judicial

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[1] George Frederick Jones.

tribunals, of leading principles to the vastly multiplied exigencies of commerce and of society. In the exemplification of these principles, he has been impressed with a sense of the propriety, in many instances, of giving an expanded outline of the facts contained in an adjudged case. In general, the cases are consistent with each other in so far as regards a recognition of, and disposition to respect, the fundamental doctrines which have been so happily and ingeniously delineated by Sir William Jones, and by the late learned Mr. Justice Story, as the foundation of the general law of bailments; but yet, the decided cases, as reported, have individually, in respect to the facts which characterize them, points of divergement, which, while the common elementary chain referred to is essentially preserved, have frequently rendered them entirely *sui generis*.

In the case of Coggs *v.* Bernard, contained in the Appendix, Lord Chief Justice Holt, in his exposition of the Law of Bailments, clearly sets forth the principles on which the Law of Carriers rests. This learned Judge not only earned the reputation of considering justice as a cardinal virtue, and not as *a trade for maintenance*,[1] but it has been recorded of him by a contemporary, that "his *dicta* and *responsa* might in general be regarded as text law, as those of Paulus, Ulpian, and Papinian, in the Roman Digest."[2] As a well-ordered expo-

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[1] See the Tattler, No. 14.

[2] Preface to the reports of cases determined by Lord Chief Justice Holt, from 1688 to 1710: London, 1738. There was in Lord Holt "a clearness and perspicuity of ideas when he defined; a distinct arrangement of them when he divided his subject; and the natural difference of things was made obvious when he distinguished between matters which form an untrue resemblance of each other. Having thus rightly formed his premises, he hardly ever erred in his conclusions." — *Ibid.*

sition of the Law of Bailment and of Carriers, his argument in the case referred to has rendered it a *leading* case on the subject, and has given it a rank among the most celebrated ever decided in Westminster Hall.[1] No higher eulogium can be pronounced upon it than that expressed by Sir William Jones, when he is content that his own admirable Essay on Bailments shall be considered merely as a commentary upon it;[2] and yet Sir William Jones has differed somewhat with him in regard to the division of the subject of bailments.[3]

Many doubts and intricacies have arisen from the attempts of common carriers to claim privileges and exemptions which are contrary to the theory of the law, as understood in the case of Coggs *v.* Bernard, and in subsequent and even contemporaneous cases. As has been said, by a learned English Judge of modern times, "Carriers are constantly endeavoring to narrow their responsibility, and I, says he, am not singular in thinking their endeavors ought not to be favored."[4] This remark was made in reference to the attempted evasion of the full common law responsibility of common carriers, by their assuming an abridgment of it by public *notices* to this effect; in other words, by their assumption of the responsibility only of *special* contractors. There have been comparatively but few cases of this sort in our American Courts, but yet the question, whether common carriers have the right to abridge their responsibility as such, in the way referred to, has been very seriously considered in this country. We refer the reader to the cases in the Appendix, of

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1 1 Smith, Lead. Ca. 95.

2 See "Lives of Eminent Judges," London, 1846, p. 135.

3 See *infra*, Chap. I. § 13.

4 Mr. Justice Burrough, in Duff *v.* Budd, 3 Bro. & Bing. R. 177.

Hollister *v.* Nowlen, and Cole *v.* Goodwin, in the Supreme Court of the State of New York. They have been placed in the Appendix on account of the great importance of the particular subject to which they relate, and because they contain, according to Chancellor Kent, "very able and learned discussions on the subject, and the validity and policy of the stern rule of the Common Law are ably and successfully vindicated."[1] The same reason is assigned for having inserted in the Appendix so much of the late "case of the Lexington," so called, decided by the Supreme Court of the United States, as relates to the same peculiarly important subject.

That there are defects in the following work, the author is not so presumptuous as to deny. Errors he has studiously endeavored to avoid, but should any of importance be discovered, notwithstanding the care which has been observed, he may betake himself against too severe a storm of censure, to the partial shelter of an old reporter, (of no great credit for accuracy,) who thus speaks to his readers: "The errata may be not important, or uneasy to be corrected in the reading; wherein, if you be intent, you may find a reasonable *reciprocation;* your judgment may correct the erratas of the book, and the book perchance correct somewhat in *your* judgment; and then you have acted mutual kindness, each to the other."[2]

To conclude, the author is aware that he has imposed upon himself an arduous undertaking; but he hopes that he may be rewarded, at least with the knowledge, that he

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[1] See note *a*, to 2 Kent, Comm. p. 608.

[2] Pref. to Latch, Reports and Cases, En la Court de Bank le Roy, 1662.

has succeeded in a tolerable degree, in abridging the labors and in guiding the inquiries of the profession, and of others whose interest or curiosity may prompt them to be conversant with the subject of any portion of his work.

PROVIDENCE, April 20, 1849.

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TREATISE

ON THE

LAW OF CARRIERS.

CHAPTER I.

PRELIMINARY VIEW OF THE LAW OF BAILMENTS.

§ 1. Any person undertaking *gratuitously* to convey for another person, goods, chattels, &c., is called in the Civil Law *mandatarius*, and by the writers and commentators on the Common Law, the *mandatary;* and the person, who, for such purpose, employs him, is, in the language of the Civil Law, *mandans* or *mandator*, or director or employer. But the persons who constitute the most numerous class of carriers, are those who undertake to carry for another for *hire* or *reward.* Every person who accepts goods or money to be carried to a particular destination for reward, paid or agreed to be paid him, for the carriage of them, impliedly lets out his labor and care in return for the reward; and the contract belongs to the class *Locatio Operis*, which was styled by the Roman Jurists, *Locatio Operis Mercium Vehendarum*, or the letting out of the work of carrying merchandise. The owner of the merchandise who delivered it to the carrier to be carried, was the letter of the work of carrying, and he was also, at the same time, the hirer of the labor and services of the carrier; whilst, on the other hand, the carrier was both the hirer of the work of carrying, and the letter of his own labor and services, to be employed with care about the conveyance of the merchandise. Of this description of carriers, there are known in the Common Law

two kinds, viz., *private* carriers, and *public* carriers: the latter being usually denominated *common* carriers, and being by far the most numerous and most important class of paid carriers.

§ 2. By the Common Law, the liabilities resulting from the delivery of goods to a carrier of either of the above mentioned descriptions, to be carried, forms an important part of the law of *bailments*. Indeed, of all the various contracts that belong to the head of bailment, that between a carrier and his employer, is by far the most important, extensive, and useful. But there is high authority for the propriety of directing attention to the law of bailment in general for a just comprehension of that portion of it to which persons acting especially in the capacity of carriers are subject. Lord Chief Justice Holt, in giving judgment, with much consideration, in the celebrated case of Coggs *v.* Bernard, upon a question involving the principle of responsibility for the safe conveying of goods, deemed it proper, in order "to show the grounds upon which a man shall be charged with the goods put into his custody, to show the several sorts of bailments;" and this, says he, he did, "not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust."[1] If it be required then, in the opinion of one of

[1] Coggs *v.* Bernard, 2 Lord Raym. R. 909; and see the case in the Appendix. In this case, Lord Chief Justice Holt seems to have traced with great attention, the subject of bailments, and he cites many passages from Bracton which he has nearly copied from Justinian. The report of this case in the first volume of the reports of Sir John Comyns, p. 133, is not near as full and satisfactory as the report in Lord Raymond's Reports, just referred to, and which is given in our Appendix. The learned editor of Coke upon Littleton, speaking of Lord Holt's argument in this case, says: "Lord Chief Justice Holt's argument in that case, as reported by Lord Raymond, particularly merits attention, it being the most masterly view of the whole subject of Bailment." Harg. Co. Litt. 89 b,

so high authority, of a Judge, to proceed in the mode thus suggested, to be enabled to arrive at a satisfactory conclusion upon a single propounded question, involving the principle of the legal liability of carriers, how much to be respected is the suggestion by an author professing to consider every question which has been propounded to the Courts of Common Law on that subject, from the earliest to the latest adjudged case. It thus seems, as it were, imperative, before commencing to treat, as is now proposed, of the law of carriers as a distinct and independent subject, to show the several sorts of bailments, and to give a compendious view of that more general branch of the law to which the decisions in respect to the legal liability of a carrier have reference; and it is intended, in so doing, to have free recourse to the profound legal erudition and philosophical labors both of Sir William Jones[1] and the late learned Mr. Justice Story.[2]

§ 3. Sir William Jones, it may be premised, has expressed his astonishment at the fact, that so important a branch of jurisprudence, as the title *bailment*, in the English law, should have, from the reign of Elizabeth to the reign of Anne, produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other part of judicial learning equally simple.[3]

§ 4. To begin with the definition of the term *bailment*. It is derived from the French word *bailler*, which signifies to

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n. 3. Abridged reports of different parts of Lord Holt's opinion are in Holt's Reports, 13, 131, 528.

[1] An Essay on the Law of Bailments, by Sir William Jones, Knt. (4th Eng. edit.)

[2] Commentaries on the Law of Bailments, with Illustrations from the Civil and Foreign Law, by Joseph Story, LL. D., one of the Justices of the Supreme Court of the United States, and Dane Professor of Law in Harvard University. 4th edition, 1846.

[3] Jones on Bailm. 2, 3.

deliver;[1] and it is a compendious expression to signify a contract resulting from delivery.[2] Sir William Jones has defined bailment to be, "A delivery of goods on a condition express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered."[3] In another part of his essay he offers a definition in language somewhat different, saying, "A delivery of goods in trust, on a contract, express or implied, that the trust shall be duly executed, and the goods re-delivered, as soon as the time or use, for which they were bailed, shall have elapsed, or be performed."[4] Blackstone has defined bailment to be, "A delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee;"[5] and again, a "Delivery of goods to another person for a particular use."[6] Story, without professing to enter into a minute criticism, thinks it may be said, that "A bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."[7] Kent may be considered to have blended, in some measure, the definitions of Jones and Blackstone,[8] and he refuses to apply the term bailment to cases in which no return or delivery, or redelivery to the owner or his agent is contemplated. "Bail-

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1 2 Black. Comm. 451. "It may be observed," says Sir William Jones, "that this is the only contract to which the French (from whom our word *bailment* was borrowed,) apply a word of the same origin; for, the letting of a house or chamber for hire is by them called *bail à loyer*, and the letter for hire *bailleur*, that is, *bailor*, both derived from the old word, *bailler*, to deliver." Jones on Bailm. 90.

2 Story on Bailm. § 2.

3 Jones on Bailm. 1.

4 Ibid. 117.

5 2 Black. Comm. 451.

6 Ibid. 395.

7 Story on Bailm. § 2, p. 4, (4th edit.)

8 So Story thinks; Story on Bailm. *ub. sup.*

ment," he says, "is a delivery of goods in trust, upon a contract, express or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered." [1] In these definitions, it will be observed, bailment is called a *contract*; and although it has been thought by some, whose opinions are entitled to consideration and weight, that in some of the species of bailment, *contract* does not subsist [2]; yet that

[1] 2 Kent, Comm. 558. In *Les Termes de la Ley*, first published in 1563, there appears the following definition of *bailment*, and one which shows that the principles of this branch of the law were not, as above stated in the text, at so late a period as that between the reigns of Elizabeth and Anne, clearly understood. The definition is, — "Bailment is a delivery of things, whether writings, goods or stuff, to another; sometimes to be delivered back to the *bailor*, that is, to him that so delivered it; sometimes to the use of the bailee, that is, of him to whom it is delivered; and sometimes, also, it is delivered to a third person. This delivery is called a bailment." This definition is considered singularly loose and unsatisfactory, and, considering the recognized accuracy of the work from which it is cited, it is corroboratory proof that, at the time the above-named work was first published, the principles of this branch of the law were not very clearly understood; for it mentions as a class of bailments, distinct from those in which there is to be a re-delivery to the bailor, or a delivery to a third person, the case of goods delivered to the use of the *bailee;* but in all such cases, there must be a trust to re-deliver to the bailor, or to deliver to a third party, or there would be no bailment; the last-mentioned class is also very incorrectly worded, — "Sometimes, also, it [*query* what?] is delivered to a third person." If this be taken to mean that the subject-matter of the bailment is delivered to a third person, he would be the *bailee;* but the meaning must be, (though the original French — "*Il est deliver à un tierce person*" — will hardly warrant that construction,) that the thing bailed is *to be delivered* by the bailee *to a third person.* See *English Monthly Law Magazine for April*, 1839. Where a contract was made between a miller and other persons, by which the former agreed to take from the latter wheat, and give them one barrel of flour for every four bushels and thirty-six pounds of wheat, it was held, that the contract was one of sale, and not of bailment; and that the destruction of the wheat, after its delivery, by the burning of the mill, was the loss of the miller, and was no defence to an action for the price. Baker *v.* Woodruff, 2 Barb. (N. Y.) R. 520.

[2] See an able article by the late Mr. J. B. Wallace, of the Philadelphia Bar, in the American Jurist for 1837, vol. 16, p. 253 to 285.

term is used, when speaking of bailment generally by Courts and Judges, without reference to the distinction of its several species.[1]

§ 5. It is obvious, from the foregoing definitions, that the law of bailments involves what Sir William Jones calls, "the great question of *responsibility for neglect*," a question upon which Blackstone speaks so loosely and indeterminately, that no fixed ideas can be collected from his words; though his commentaries are the most correct and beautiful outline that ever was exhibited of any human science.[2] Before considering, therefore, the different kinds of bailments, this great question, which is of the utmost importance in illustrating the law of carriers, demands attention. From the obligation contained in the definition of bailment, *to restore the thing bailed at a certain time*, it follows that the bailee (a carrier for instance) must *keep* it, and be responsible to the bailor, (the person, for instance, by whom a carrier is employed,)[3] *if it be lost or damaged;* but as the bounds of justice would, in most cases, be transgressed, if he were made liable for the loss of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment;* and the investigation of this *degree*, in every particular contract, is the problem which involves the principal difficulty.[4]

§ 6. As to the various degrees of care or diligence which are recognized in the law, Sir William Jones, with his characteristic acuteness, says, "that there are infinite shades, from the slightest momentary thought or transient glance of attention, to the most vigilant anxiety and solicitude. But extremes," he says, "in this case, as in most others, are inapplicable to practice; the first extreme would seldom enable the bailee to perform the condition, and the second ought

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[1] See *post*, note to § 19.
[2] Jones on Bailm. 3.
[3] Jones on Bailm. p. 5.
[4] Ibid. p. 6.

not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees of care to be sought, then, must lie somewhere between these extremes; and, by observing the different manners and characters of men, a certain standard may be found, which will greatly facilitate an inquiry; for, although some persons are excessively careless, and others extremely vigilant, and some through life, and others only at particular times, yet it is perceptible that the generality of rational persons use nearly the same degree of diligence in the conduct of *their own* affairs. This care, therefore, which *every person of common prudence, and capable of governing a family*, takes of *his own* concerns, is a proper measure of that which would uniformly be required in performing every contract, if there were not strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less* degree of attention. Here, then," says Sir William Jones, " we may fix a constant determinate point, on each side of which there is a series consisting of variable terms, tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigor; if the construction be *favorable*, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and in the first case, the measure will be that care which *every man of common sense, though absent and inattentive*, applies to his own affairs; in the second, the measure will be that attention which a man *remarkably exact and thoughtful* gives to the security of his personal property.[1]

§ 7. Story thinks, that although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances; yet that may be said to be common or ordinary diligence in the sense of the law, which men of

[1] Jones on Bailm. 5, 6.

common prudence generally exercise about their own affairs, in the age and country in which they live; and this he affirms to be more a matter of fact than of law;[1] and the later decisions hold, that it must often be left to the jury upon the nature of the subject-matter, and the particular circumstances of each case.[2] The variable character of the standard of diligence is very happily illustrated by Story. In one country, or in one age, says he, acts may be deemed negligent, which, at another time, or in another country, may justly be deemed an exercise of ordinary diligence, and it is important, says he, to attend to this consideration, not merely to deduce the *implied* obligations of a party in a given case, but also to possess ourselves of the true measure by which to fix the application of the general rule. Thus, in times of primitive or pastoral simplicity, when it was customary to leave flocks to roam at large by night, it would not be want of ordinary diligence to allow a neighbor's flock which is deposited with us, to roam in the same manner. But, if the general custom were, at night, to pen them in a fold, it would doubtless be a want of such diligence, not to do the same with them. In many parts of America, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is quite usual to leave barns, in which horses and other cattle are kept, without being locked by night. But in cities, where the danger is much greater, and the temptations more pressing, it would be deemed a great want of caution to do the same. If a man were to leave his friend's horse in his field, or in his barn, all night, in many country towns, and the horse were stolen, it would not be imagined that any responsibility was incurred. But if, in a large city, the same want of precaution were shown, it would be deemed, in many cases, gross

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[1] Story on Bailm. § 11; and see Vaughn *v.* Menlove, 3. Bing. N. Cases, 468.

[2] Per Shaw, C. J., in Whitney *v.* Lee, 8 Met. (Mass.) R. 91; and see Cairns *v.* Mills, 8 M. & Welsb. R. 238.

neglect. If robbers were known to frequent a particular district of country, much more precaution would be required than in districts where robberies were of very rare occurrence. What, then, is usually done in a country, in respect to things of a like nature, whether it be more or less in point of diligence, than what is exacted in another country, is in fact the general measure of diligence.[1]

§ 8. The customs of trade and the course of business also have an important influence. If, in the course of a particular trade, particular goods, as for instance, coals, are usually left on a wharf without any guard or protection during the night, and they are stolen, the wharfinger, or other person having the custody, might not be responsible for the loss, although, for a like loss of other goods not falling under a like predicament, he might be responsible. If a chaise were left during the night under an open shed, and were stolen, the bailee might not be liable for the loss, if such was the usual practice of the place; and yet he would be, if other precautions were usually taken. In short, diligence is usually proportioned to the degree of danger of loss, and that danger is, in different states of society, compounded of very different elements.[2] What constitutes ordinary diligence may also be materially affected by the nature, bulk, and value of the articles. A man would not be expected to take the same care of a bag of oats as of a bag of gold; of a bale of cotton as of a box of jewelry; of a load of wood as of a package of paintings; of a block of marble as of a sculptured statue. The value, especially, is an ingredient to be taken into consideration upon every question of negligence; for, that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of a common parcel, would not be so.[3]

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[1] Story on Bailm. § 11, 12, 13, 14, 15.

[2] See Gordon *v.* Hutchinson, 1 Watts & S. (Penn.) R. 285.

[3] Story on Bailm. § 13, 14, 15.

§ 9. The fixed mode or standard of diligence Sir William Jones calls *ordinary*. The degrees on each side of this standard, need not, he says, be distinguished by any precise denomination; the first may be called *less*, and the second *more than ordinary* diligence. Then he proceeds to say, that just in the same manner, there are infinite shades of *default* or *neglect*, from the slightest inattention, or momentary absence of mind, to the most reprehensible supineness and stupidity; and these are the omissions of the beforementioned degrees of diligence, and are exactly correspondent with them.[1]

§ 10. The three degrees of negligence are thus distinguished, both in the Civil and the Common Law, by name: 1. *Gross* neglect, *lata culpa*, as the Roman lawyers call it, is in practice considered as equivalent to *fraud;* and consists, according to Sir William Jones, in the omission of that care *which even inattentive and thoughtless men never fail to take of their own property;* this fault, the best interpreters of the Civil Law hold to be clearly a violation of *good faith.*[2]

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[1] Jones on Bailm. 7, 8; Story on Bailm. § 17.

[2] Jones on Bailm. 21; Story on Bailm. § 18. Story remarks, that in various passages of the Essay of Sir William Jones, it seems to be assumed, that, in the Common Law, as in the Civil Law, gross negligence and fraud are equivalent. Thus, he observes, *ordinary* negligence is spoken of as "a mean between fraud and accident." (p. 8); gross negligence as "inconsistent with good faith." (pp. 10, 46, 119); and a bailee without reward, as being "answerable only for fraud, or for gross negligence, which is considered evidence of it." (p. 46.) But this doctrine is not warranted by the Common Law authorities. One case opposed to it is put by Sir W. Jones himself. If, he says, (p. 57,) a depositor commits a gross neglect in regard to his own goods, as well as those which are bailed, by which both are lost or damaged, he cannot be said to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person. So, where a cartoon was left in the hands of an auctioneer, without any particular agreement to take care of it, or re-deliver it safe, and without any agreement for a reward, and it appeared that the painting was upon paper pasted on canvass, and that the bailee kept it in a room next to a

2. *Ordinary* neglect, *levis culpa*, is the *want* of that diligence which the *generality of mankind use in their own concerns*, that is, of *ordinary care*.[1] 3. *Slight* neglect, *levissama culpa*, is the *omission* of that care which *very attentive and vigilant persons take of their own goods*, or, in other words, of *very exact diligence*.[2]

§ 11. Such, then, are the nature and various degrees of negligence, and of diligence, and the next question is in what manner the law applies them. The answer is as short

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stable in which there was a wall, which had made it damp and peel — it was held gross neglect, and the bailee was held responsible, although there was no imputation of fraud. These cases show that gross negligence is not equivalent to fraud, according to the Common Law authorities. On the contrary, gross negligence is, or at least may be, entirely consistent with good faith and honesty of intention; and to confound it with fraud, would be most mischievous, for then, unless a jury should believe the party guilty of fraud, no laches would come up to the legal notion of gross negligence, so as to entitle the sufferer by the loss to recover. A man may leave a casket of jewels or a purse of gold upon the table of a public room at an inn, or may leave a package of bank bills in a great coat in the common entry of an inn, from pure thoughtlessness; and a jury might be well satisfied that it was gross negligence. But if fraud were a necessary ingredient, the very statement of the case would negative a right of recovery. Besides, if gross negligence were equivalent to fraud, there could be no defence set up by the bailee, founded either on his own conduct in respect to his own goods, or on a special contract not to be liable for gross negligence. But there is no principle in our law, that would prevent a *depositary* from contracting not to be liable for any degree of mere negligence. Story on Bailm. § 20, *et seq*. With respect to *common carriers*, however, fraud may be presumed, as will be shown, *post*. Gross negligence certainly approximates to *dolus malus*, and is tantamount, in the mischief it produces, to a breach of good faith. It bears so near a resemblance to fraud, as to be equivalent to it in its effect upon contracts, though, by the Common Law, it may not be fraud by inference, but a matter of fact for the jury. 2 Kent, Comm. 559; Foster *v.* Essex Bank, 17 Mass. R. 479; Wilson *v.* York & Md. Railr. Co. 11 Gill & Johns. (Md.) R. 58. And see *post*, § 22, *et seq*.

[1] Jones on Bailm. 22; Story on Bailm. § 18.

[2] Ibid.

and simple as it is rational. When the bailment is for the sole benefit of the bailor, the law requires only *slight* diligence on the part of the bailee, and he is consequently responsible for nothing less than *gross* neglect. When the bailment is for the sole benefit of the bailee, an *extraordinary* degree of care is demanded, and the bailee is therefore responsible for *slight* neglect. When the bailment is reciprocally beneficial to both parties (as in the case of the carriage of goods for hire,) such care is exacted of the bailee as every prudent man commonly takes of his own goods; or, in other words, the law requires *ordinary* diligence on the part of the bailee, and makes him responsible for *ordinary* neglect. Such are the rules recognized by the Common Law; a like division of the degrees of responsibility is to be found in the Civil Law; and the same rules are found in the French and Scotch law, and may be deemed indeed the general result of the law of Continental Europe.[1] But it is often difficult to mark the lines of distinction between the different degrees of negligence, so as to show precisely where the one ends and the other begins; and, therefore, by the Common Law, it is left to the jury, upon the nature of the subject-matter, and the particular circumstances of each case, to say whether the particular case is within the one or the other.[2] Every person who is a bailee, whether for hire or not, is bound to take proper and prudent care of that which is committed to him; and the Courts, in modern times, have acknowledged the difficulty in defining the difference between one of the sorts of the negligence designated by the epithets of the Civil Law and another [3]; and there is clearly a want of precision in the use of the term negligence, which, *per se* is

[1] Jones on Bailm. 22, 23, 24; Story on Bailm. § 23, 24; Coggs *v.* Bernard, 2 Ld. Raym. R. 909, and Appx.; Pothier, Traité de Depot, n. 23; Pothier, Oblig. P. 1, ch. 2, art. 1, § 1, n. 141; 1 Bell, Comm. 453, (5th ed.); Ersk. Inst. 448; Heinec. Elem. Jur. Inst. Lib. 3, tit. 15, § 12.

[2] See Opinion of Shaw, C. J., in Whitney *v.* Lee, 8 Met. (Mass.) R. 91. And see *ante*, § 7, 8.

[3] See *post*, § 22, 23, and § 48 – 52.

insufficient to express the distinction between negligence in law and negligence in fact.[1] From these principles it however follows, that bailees in general are not responsible for losses resulting from unavoidable accident, or from irresistible force; and yet (as will be shown, in treating of the particular liability of carriers) bailees may become so responsible, both by special contract, and by the special policy of the law.

§ 12. It may here be proper to notice the distinction between *negligence* and *misfeasance*. It seems to be this; that the former takes place in the course of performing the contract, the latter in an act done in direct contravention of it, by which its performance is prevented. An instance of the latter is, where the defendants received a parcel, and contracted to send it by the mail, and it was sent in a different manner (by another coach,) and was lost. The Court held, that if the defendants had forwarded the parcel by the mail, in pursuance of the contract, they would not have been liable for the loss, but as they had acted in direct contravention of it, it was a *misfeasance*.[2] If a gratuitous bailee enters upon the performance of the safe keeping of the thing entrusted to him, and in the execution of it, does it amiss, through the want of due care, by which damage ensues to the bailor, it is a misfeasance for which an action will lie; but if a person engages, that he will gratuitously take charge of a thing, and then wholly omits to enter upon the execution of his promise, it is a nonfeasance for which, at Common Law, no action will lie.[3]

§ 13. As before mentioned,[4] Lord Holt, in Coggs *v.* Ber-

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[1] See *post*, § 22, 23, and § 48 – 52.

[2] Sleat *v.* Fagg, 5 B. & Ald. R. 342. See also Ellis *v.* Turner, 8 T. R. 531; Garnett *v.* Willan, 5 B. & Ald. R. 53.

[3] Thorne *v.* Deas, 4 Johns. (N. Y.) R. 85. And see *post*, note to § 19; and for a more full explanation of the distinction between negligence and misfeasance, see *post*, § 269 – 274.

[4] See *ante* § 2.

nard,[1] has traced with much attention the *different species* of bailment; which, it will at once be perceived, are derived from the Civil Law, to which Bracton had recourse in expounding the law of bailment;[2] and by the elaborate opinion of that learned Judge, in the case just referred to, and by the Essay of Sir William Jones, the different sorts of bailment in the Civil Law have become transferred to the Common Law.[3] The division of bailments by the above mentioned Judge, is into six sorts, but this division has since been considered somewhat inaccurate, because in fact his fifth division is no more than a branch of his third; and he might, with equal reason, have added a seventh, since the fifth is capable of another subdivision.[4] The Common Law, as now understood and applied, recognizes but five general species of bailment, which may be thus enumerated and defined, with all the Latin names, one or two of which Lord Holt has omitted: 1. *Depositum*, or Deposit, which is a naked bailment, without reward, of goods to be *kept* by the bailor, and to be returned when the bailor shall require it. The appellation and the definition are both derived from the Civil Law. *Depositum est, quod custodiendum alicui datum est* (Dig. Lib. 16, tit. 4. l. 1.) 2. *Mandatum*, or Mandate, which is defined to be a bailment of goods without reward, to have some act performed about them, or *to be carried* from place to place. This appellation is also derived from the Civil Law. *Man-*

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[1] Coggs *v.* Bernard, 2 Ld. Raym. R. 909, and Appendix.

[2] See Bracton and the Civil Law referred to by Lord Holt in Coggs *v.* Bernard, *ub. supra*. See also Wood, Civil Law, 235; 1 Domat, B., 1, tit. 4, § 1; 1 Bell, Comm. 452, (5th ed.); 2 Kent, Comm. 585; Story on Bailm. § 8.

[3] Story on Bailm. § 8; Jones on Bailm. 36, 117. Lord Holt presided as lately as the second year of Queen Anne; and a point which the first elements of Roman Law have so fully decided, that no Court of judicature on the continent would suffer it to be debated, was thought in England to *deserve*, what it certainly received, *very great consideration*. Jones on Bailm. 58, referring to the opinion of Lord Holt in Coggs *v.* Bernard, *ub. sup.*

[4] Jones on Bailm. 36.

dantis tantum gratiâ intervenit mandatum, is the language of the Institutes;[1] *Mandatum, nisi gratuitum, nullum est*, is that of the Pandects.[2] 3. *Commodatum*, or *loan for use*, when goods are bailed without pay, to be *used* for a certain time by the bailee.[3] It differs from what is called in the Civil Law a *Mutuum* in this, that in a *Commodatum* the goods are lent to be specifically returned; in a *Mutuum* the goods are to be consumed, and are to be repaid in property of the same kind. Thus, corn or wine, delivered to some one to be consumed, and to be repaid in kind, is a case of *Mutuum;* but if a horse be gratuitously lent for a journey, it is a case of *Commodatum*. 4. *Pignori acceptum*, when a thing is bailed by a debtor to his creditor, in *pledge* or pawn, as security for some debt or engagement. 5. *Locatum*, or *hiring*, which is always *for a reward;* and this bailment is either first, *Locatio rei*, by which the hirer gains the temporary use of *the thing*, or secondly, *Locatio operis faciendi*, when *work* and *labor*, or *care* and *pains*, are to be performed or bestowed on the thing delivered; or thirdly, *Locatio operis mercium vehendarum*, when goods are bailed for the purpose of being carried from place to place for hire, either to a *public* carrier, or to a *private* person.

§ 14. The above division of bailments, and the definitions of each sort are borrowed from the Essay of Sir William Jones on Bailments, and from the Commentaries on the same subject of the late Mr. Justice Story.[4] The latter sort, *Lo-*

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[1] Inst. Lib. 3, tit. 27, § 1.

[2] Dig. Lib. 17, tit. 1; Story on Bailm., notes 4 and 5 to § 5.

[3] The same definition is given in the Civil Law. Story on Bailm. § 6.

[4] See Jones on Bailm. 36, and Story on Bailm. § 4, 5, 6, 7. Lord Chief Justice Holt's arrangement of bailments into six classes is as follows. 1. Depositum: A bare naked bailment of goods delivered by one man to another to keep for the use of the bailor. 2. Commodatum: When goods or chattels that are useful, are lent to a friend *gratis*, to be used by him. 3. Locatio rei: Where goods are lent to the bailee to be used by him *for hire*. 4. Vadium or Pawn. 5. Locatio operis faciendi: Where goods are delivered to be carried, or something is to be done about

catum or *hiring*, which is subdivided by the former writer, as above given, into *three* sorts, the latter writer, following the Civil Law, has subdivided into *four* sorts, thus: 1. The

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them, for a reward to be paid to the bailee. 6. Mandatum: A delivery of goods to somebody, who is to carry them, or do something about them *gratis*. Sir William Jones objects to this arrangement, because the fifth class (as he says) is no more than a branch of the third, and because a 7th might have been added, since the 5th (and he might have said the 6th also) is capable of another subdivision. But Mr. Smith, in his note to Coggs *v.* Bernard, has refuted this opinion: "For, there exists," he says, "between them this essential difference, viz., that in cases falling under the *third class*, or *locatio rei*, the *reward* is paid *by* the bailee *to* the bailor; whereas, in cases falling under the *fifth class*, or *locatio operis faciendi*, the *reward* is always paid *by* the bailor *to* the bailee. It is true, that in Latin both classes are described by the word *locatio*, which probably gave rise to Sir William Jones's opinion, that both ought to be included under the same head; but then in the *third class*, *locatio rei*, the word *locatio* is used to describe a mode of bailment, viz., by the *hiring of the thing bailed;* whereas, in the *fifth* class, *locatio operis faciendi*, the same word *locatio* is used, not to describe any mode of bailment, but to signify *the hiring of the man's labor who is to work upon the thing bailed;* for as to the thing bailed, that is not hired at all, as it is in cases falling within the third class. If, indeed, Lord Holt had been enumerating the different sorts of *hirings*, not of *bailments*, he would, no doubt, like the civilians, have classified both *locatio rei*, and *locatio operis*, under the word *hiring;* since in one case goods are hired, and in the other labor. But he was making out a classification, not of *hirings*, but of bailments; and since in cases of *locatio rei* there is a hiring of the thing bailed, and in cases of *locatio operis* no hiring of the thing bailed, it was impossible to place, with any degree of propriety, two sorts of bailments under the same class, one of which *is*, and the other which *is not*, a bailment by way of hiring. As to the objection that Lord Holt's fifth class of bailments is capable of another subdivision, there is no doubt but that it may be split, not only, as Sir William Jones suggests, into *locatio operis faciendi* (where work is to be done upon the goods,) and *locatio operis mercium vehendarum* (where they are to be carried,) but into as many different subdivisions as there are different modes of employing labor upon goods; and, in point of fact, the civilians, in their division of hirings, enumerated another class, viz., *locatio custodiæ*, or the hiring of care to be bestowed in guarding a thing bailed, which is omitted by Sir William Jones. For these reasons it is submitted, that Lord Holt's classification is the correct one." 1 Smith's Leading Cases, 98. And see Eng. Monthly Law Mag. for April, 1839.

hiring of a thing for use (*locatio rei.*) 2. The hiring of work and labor (*locatio operis faciendi.*) 3. The hiring of care and services to be performed or bestowed on the thing delivered (*locatio custodiæ.*) 4. The hiring of the carriage of goods (*locatio operis mercium vehendarum*) from one place to another. The three last, says the learned American Commentator, are but subdivisions of the general head of hire of labor and services.[1]

§ 15. But the most general and simple division of bailments, and one which includes all the above-mentioned sorts, is into *three* kinds. *First*, those in which the trust is exclusively for the benefit of the bailor. *Secondly*, those in which the trust is exclusively for the benefit of the bailee. *Thirdly*, those in which the trust is for the benefit of both parties. The first embraces *deposits* and *mandates;* the second, *gratuitous loans for use;* the third, *pledges* or *pawns*, and hiring and letting to hire.[2] The first of these three general divisions includes the carriage of goods *without* hire; and the last the carriage of goods *for* hire, as was stated in the commencement of the present chapter.[3] The carriage of goods without hire, will be the subject of the following chapter.

§ 16. In the conclusion of the present chapter, it may be stated, that the following chapters will render obvious the truth of the general remark, equally applicable in our country, made by Sir William Jones, in the concluding portion of his Essay on the Law of Bailments, viz.: "All the preceding rules and propositions may be diversified to *infinity* by the *circumstances* of every particular case; on which circumstances it is on the continent, the province of a *Judge*

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[1] Story on Bailm. § 8.

[2] Story on Bailm. § 3; and see English Monthly Law Mag. for April, 1839, p. 216.

[3] See *ante*, § 1.

appointed by the sovereign, and in England, of a *jury* freely chosen by the parties, finally to decide." [1]

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[1] Jones on Bailm. 122; and see Ante, § 7, 8, 11. "There is no time," it has with truth been said, "when the law is stationary and stable; but it is kept in perpetual movement by the varying condition of the nation, and, therefore, the only way in which the spirit of the law can be seized, is to study it historically, to begin with the custom in its cradle, and to follow it through all its changes down to the existing epoch. To borrow an illustration from another science, law not being a fixed quantity, but variable according to a certain rule, it becomes necessary to ascertain what, in mathematical language, may be called its *fluxions*, the *formula* of its variation. It is history only that can furnish this *calculus*, which is the basis of all true and just science in law. Without this knowledge, a jurist may repeat the words, but can never penetrate the *living spirit* of the law." See article in 5th vol. of American Jurist, p. 23, entitled, "Written and Unwritten Systems of Laws."

CHAPTER II.

OF CARRIERS WITHOUT HIRE.

§ 17. The law, then, imposes upon a carrier without hire, or the person who undertakes to carry goods for another *gratuitously* (the mandatary,)[1] the obligation only of *slight* diligence, and renders him liable only for *gross* negligence.[2] It is of the essence of the contract of mandate, that it be *gratuitous*, for if any compensation is to be paid, it becomes then the contract for hire. *Mandatum, nisi gratuitum, nullum esse;* and in this particular, it matters not whether the compensation is express or implied; nor whether certain or uncertain in amount.[3]

§ 18. The great leading case in support of the above proposition respecting the responsibility of a carrier without hire, is the case of Coggs *v.* Bernard.[4] In this case the

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[1] See *ante*, § 1, 13. And see respecting the general subject of Mandates, Chap. III. of Story on Bailments.

[2] See Ante, § 10, 11.

[3] Story on Bailm. § 153, and the authority of the Dig. and of Pothier, Pand. their cited. If there is a mere *honorary* payment, not as a compensation, but as a mark of respect and favor, this, by the Civil Law authorities, is still a mandate. In England, counsel are understood not to be at liberty to make any pecuniary charge for their services, for advice, and the compensation given is deemed a gratuity; and their employment, therefore, in the Civil Law, would be called a *mandate*. Story, *ub. sup.* In a case where the defendant received hops from the plaintiff for the purpose of being carried for hire, and kept them for the plaintiff in a warehouse for thirteen months, and for that time he had warehouses which before had belonged to another, but had not made any charge to the plaintiff for warehousing; it was held, that he was not a gratuitous bailee. White *v.* Humphrey, 12 Jur. 417, Q. B.

[4] Coggs *v.* Bernard, 2 Ld. Raym. R. 909, and Appendix.

defendant undertook to remove several casks of brandy from one cellar to another, and there lay them down *safely*, but managed so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff, a motion was made in arrest of judgment, on the irrelevancy of the declaration, in which it was neither alleged, that the defendant was to have *any recompense for his pains*, nor that he was a *common porter*. But the Court were unanimously of opinion, that the action lay, and the elaborate judgment of Lord Chief Justice Holt, has rendered the case one of the most celebrated ever decided in Westminster Hall.

§ 19. By the argument of Lord Holt in the above case, if the agreement had been executory, as if the defendant had assumed to carry the goods in question, and had failed to do so, no action could have been sustained. It would have been like the case where a man promised another to build him a house by such a day and failed in the performance of the promise, in which case it was adjudged (11 Hen. 4, 33,) that an action would not lie. But in the case in question, the defendant actually entered upon the undertaking according to his promise, and therefore was liable to an action for the deceit put upon the plaintiff who trusted him; for, although he was not bound to enter upon the trust, yet if he do enter upon it, he must take care not to miscarry, at least, by any mismanagement of his own. But should a person have run upon the defendant in the street, and thrown down the cask of brandy, or had privately pierced it, it would be otherwise, because the defendant had no reward. In short, although a party is to receive no benefit or reward, if he assumes a trust, he is under obligation to perform it.[1]

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[1] In an article in the American Jurist for January, 1837, (vol. 16, p. 253 to 285,) written by the late Mr. J. B. Wallace, of the Philadelphia Bar, it is ably contended, that, in *mandate* and in *deposit*, there is no *contract* at all, expressed or implied; his argument being, that every contract presupposes a sufficient consideration in point of law, to sustain it, and that, in

§ 20. The point which the decision in Coggs *v.* Bernard directly involves, viz., that if a man undertake to carry goods safely, he is responsible for damage sustained by them

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the classes of bailment just mentioned, there is no sufficient consideration moving to the bailee, as the bailee acts *gratuitously*. "It is seen," says he, "that, in pursuance of a most useful practical principle, no action lies against the mandatary for nonfeasance (there being in legal contemplation no contract to *do*); and it is farther seen, that if the mandatary does undertake or begin the execution of his trust, and does it so negligently as to injure the thing bailed, an action does lie against him for this misfeasance. But this right of action is not by virtue of his contract, for no contract exists after he begins to *do*, more than before. It rests on the broad principles of general justice; it is founded on the *tort;* it arises not *ex contractu*, nor even *quasi ex contractu*, but *ex delicto*. It would lie equally, if the injury were done to the thing bailed, while in the hands of the mandatary, even before he begins to execute the trust; though generally this cannot practically be, as the injury usually occurs in the execution." This simple explanation, says Mr. W., removes all difficulty, and shows, that the form of action is not *assumpsit* but *case;* and he is of opinion, that, in this view of the matter, "there is no inconsistency, that no principle is violated, and that every thing is congruous." Mr. Justice Story, in reply to the acute reasoning of Mr. W. says: "It seems to me very clear, both upon principle and authority, that in every case of deposit and of mandate, there is such a contract, founded on a sufficient consideration, and capable of being so enforced (that is at law,) whenever the bailment has been executed by a delivery of the thing to the bailee. In the case of a deposit, no one can doubt that there is an engagement or promise to re-deliver the thing to the bailor. The latter parts with his possession of it upon the faith of the due fulfilment of that engagement or promise; and it cannot make any difference in relation to the legal validity of that engagement or promise, whether the bailee has expressly promised to re-deliver it to the bailor, or whether it is inferred from implication from the acts and intentions of the parties. In each case the consideration is precisely the same. What is the consideration? It is on the part of the bailor yielding up his present possession, custody, and care of the thing to the bailee, upon the faith of his engagement or promise to re-deliver it. It is true, the bailee may derive no benefit from the deposit. But that is not the only source of legal considerations. A detriment or parting with a present right, or delaying the present use of a right on the part of the promisee, is a sufficient consideration to support a contract by the promisor, although the promisor derives no benefit whatever from it." See note to p. 4, § 2, of 4th ed. of Story on Bailm. The authorities cited by

in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage, is now clear law, and forms a part of a general proposition in the law of principal and agent, which may be stated, it

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the learned author, besides the opinion of Lord Holt in Coggs *v.* Bernard, in support of the proposition, that where a gratuitous undertaking to deliver a thing at the request of the owner, *is entered upon*, it becomes a valid and obligatory contract upon the bailee to perform the duty of re-delivery, expressly or impliedly resulting from his engagement, are Comyns's Dig. Act on the Case, Assumpsit, B.; Williamson *v.* Clements, 1 Taunt. R. 523; Lengridge *v.* Dorville, 5 B. & Ald. R. 117; Wheatly *v.* Law, Cro. Jac. 668; S. C. Palmer, R. 281. This last case was a mandate of money, not goods, and it was finally established, that there was a sufficient consideration to support the action; and the judgment was affirmed in error. There are also referred to the more modern cases of Whitehed *v.* Greetham, 1 McLell. & Younge, R. 205; S. C. 2 Bing. R. 264; Doorman *v.* Jenkins, 2 Adol. & Ell. R. 256; Shillibeer *v.* Glyn, 2 M. & Welsb. R. 143. Sir James Mansfield, in Mills *v.* Graham, 4 Bos. & Pull. R. 140, 145, says: "A bailment of goods to be re-delivered, imports an agreement to re-deliver. All special bailments import a contract to re-deliver, when the purpose for which the goods were deposited is answered. See also Smedes *v.* Bank of Utica, 20 Johns. (N. Y.) R. 377; S. C. in Error, 3 Cow. (N. Y.) R. 662; Bank of Utica *v.* McKinster, 11 Wend. (N. Y.) R. 473; Todd *v.* Figley, 7 Watts (Penn.) R. 542. The distinction between engaging to do an act gratuitously and then omitting to do it, and an unfaithful performance of the engagement after its execution is entered upon, or, in other words, the difference between nonfeasance and misfeasance in gratuitous bailees, is as very learnedly discussed at the bar and by Ch. J. Kent in Thorne *v.* Deas, 4 Johns. (N. Y.) R. 84 to 102. Sir William Jones considers (Essay on Bailm.) that an action will bar the non-performance of a promise to become a mandatary, though the promise be merely gratuitous; but all the leading cases show, that by the Common Law, a person who undertakes to do an act for another, without reward, is not answerable for omitting to do the act; and that he is only responsible when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance, but not for nonfeasance, even though special damages are averred. "Those," says Kent, C. J. in Thorne *v.* Deas, *ub. sup.* "who are conversant with the doctrine of *mandatum* in the Civil Law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret that Sir William Jones was not successful in his attempt to ingraft this doctrine, *in all its extent*, into the English law."

has been laid down, in the following words: viz., *The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.* This is a proposition which includes cases stronger than that of Coggs *v.* Bernard, for there, the defendant had undertaken to lay the goods down *safely*, and thus introduced a special term into his contract. From Lord Holt's judgment in this case, it will be seen, that notwithstanding what was said by Lord Coke in Southcote's case, there is a difference between the effect of a gratuitous undertaking to *keep* or *carry* goods, and a gratuitous undertaking to *keep* or *carry* them *safely*. But under the rule just laid down, a gratuitous and voluntary agent, who has given no special undertaking, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound not to be guilty of *gross negligence*.[1] It is indeed clear, from the decisions which will

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[1] See note to Coggs *v.* Bernard, by Smith, 1 Smith's Lead. Cas. 96. The decision in the case of Southcote, referred to in the text, has not been questioned, but the dictum of Lord Coke, (see the case, 4 Rep. 84; Cro. Eliz. 815,) "that to keep and *to keep safely* are one and the same thing," Sir William Jones considers to be completely overthrown by Lord Holt in Coggs *v.* Bernard. All the later authorities explode the doctrine, that an undertaking *to keep*, and an undertaking to keep *safely*, amount to the same thing. Story on Bailm. § 72. Southcote's case, according to Lord Coke's own report, was as follows: He brought detinue against the defendant, Bennet, for certain goods, and declared, that he delivered them to the defendant to keep safe; the defendant confessed the delivery; and pleaded in bar, that, after the delivery, one J. S. stole them feloniously out of his possession; the plaintiff replied, that the said J. S. was the defendant's servant, retained in his service, and demanded judgment; and, upon demurrer in law, judgment was given for the plaintiff. And the reason or the cause of the judgment was, because the plaintiff delivered the goods to be safely kept, and the defendant had taken it (the risk) upon him by the acceptance upon such delivery, and, therefore, he ought to keep them at his peril; although, in such a case, he should have nothing for his safe keeping. This is the substance of the case (see Story on Bailm. § 69); and Lord Coke, in the sequel, proceeds to expound *his own* views of the general doctrine, with that superabundance of learning for which he was so remarkable. Sir William Jones, in commenting upon this case, (dis-

be offered, that a gratuitous bailee (as a carrier without hire) is chargeable for *gross negligence*, if not liable for other kinds of negligence.

§ 21. The rule as to responsibility for gross negligence in a *depositary*, it is evident from what has been offered, will apply to a *mandatary*, or a carrier without hire. The liability of both seem to be precisely the same, and both are bound to *slight diligence*, and to *slight diligence* only, and are liable for nothing short of *gross negligence*, the reason in each being the same, viz., that neither is to receive any reward for his services.[1] In Doorman *v.* Jenkins,[2] which was the case of a depositary, Mr. J. Taunton says: "The counsel properly admitted, that as this bailment was *for the benefit of the bailor*, and no remuneration was given to the bailee, the action could not be maintainable except in the case of *gross negligence*." In the case of Foster et al. *v.* Essex Bank,[3] the Court say, that in case of a deposit to be kept without reward, "the bailee will be answerable only for *gross negligence*, which is considered as equivalent to a *breach of faith*." Where a promissory note was delivered to a bailee, on the voluntary undertaking, without reward, *to secure and take care of it*: it was held, that he was not bound to take any active measures

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claiming any intention to speak in derogation of the great commentator of Littleton,) says, "it must be allowed, that his profuse learning often ran wild, and that he has injured many a good cause by the vanity of thinking to improve them." Jones on Bailm. 42.

1 "The contract of mandate is so nearly allied to that of deposit, that it may properly be deemed to belong to the same class." Story on Bailm. § 140; see also Ibid. § 150. That all *unpaid* agents are bound not to be guilty of gross negligence. See note by Mr. Smith to the case of Coggs *v.* Bernard, 1 Smith's Lead. Cas. p. 219 of the Am. ed., 1847, and the note of Mr. Wallace, the American Editor, Ibid. p. 241; and see Shiells *v.* Blackburne, 1 H. Black. R. 158.

2 Doorman *v.* Jenkins, 2 Adol. & Ell. R. 256.

3 Foster et al. *v.* Essex Bank, 17 Mass. R. 479. On a bailment to keep, without an interest, the bailee is liable only for gross negligence. Chase *v.* Maberry, 3 Harring. (Del.) R. 266.

to obtain security, but was simply bound to keep the note carefully and securely, and receive the money; and that the owner could not recover of him for the loss thereof, without proof of gross negligence or fraud.[1] Accordingly, whenever the extent of a mandatary's liability is discussed, it is common to find cases respecting that of depositaries cited and relied on, and so *vice versa*.

§ 22. *Gross negligence* has already been defined,[2] and it appears from the definition which has been given, that it means nothing more than, in the words of Mr. J. Taunton, "a great and aggravated degree of negligence as distinguished from negligence of a lower degree."[3] Therefore, as the learned Judge, in the case referred to, says, there may be cases where the question of gross negligence is matter of law more than of fact, and others, where it is matter of fact more than of law. All the cases afford illustration of the difficulty of defining gross negligence with satisfactory precision; but the case of Tracy *v.* Wood[4] is considered very striking, in respect of the nice and difficult line of distinction between what is and what is not gross negligence, under the circumstances.[5] The explanations to the jury by the learned Judge, in that case, are, that gross negligence is the want of that care which unpaid bailees, of ordinary prudence, usually take of bailed property; again, the want of that care which men of common sense, however inattentive, usually take of their own property; again, the care which men ought to be presumed to take of their own property; again, the reasonable care which unpaid bailees usually take of bailed property; and, again, that reasonable care which he himself

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[1] Whitney *v.* Lee, 8 Met. (Mass.) R. 91.

[2] See *ante*, § 10.

[3] Doorman *v.* Jenkins, 2 Adol. & Ell. R. 261.

[4] Tracy *v.* Wood, 3 Mason (Cir. Co.) R. 132.

[5] See note (*a*) to p. 572 of Kent Comm.; and see Foster *v.* Essex Bank, *ub. sup.*

usually took of bailed property. It has been ably argued, that the Common Law principle set out, in the nature of the action, that any negligent conduct which causes injury or loss, or which satisfies the jury that there has been fraud and collusion, explains itself more clearly than those various definitions explain it. The expressions, as is said, convey so indefinite a meaning, that we find Lord Holt saying, that a hirer and borrower are both liable for slight negligence, and Sir William Jones and Mr. Justice Story maintaining, that a borrower is liable for slight negligence, and a hirer only for gross negligence. There is no test to which these difficulties are to be submitted but the form of the pleadings. The action against both is the same, and charges negligent conduct, occasioning injury or loss; from which it appears that the older Judge is right in saying, that the same degree of negligence will make both liable (with which Blackstone agrees); and also in saying, that slight negligence or any negligence, if it be the legal *cause* of the injury or loss, will make them liable.[1]

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[1] Note of Mr. Wallace to Coggs *v.* Bernard, commencing on p. 227 of 1 Smith's Lead. Cas. (Amer. ed., 1847.) In the note referred to, Mr. Wallace also says, — "We find it frequently laid down, that an unpaid bailee is liable only for *gross negligence*. This, it will be observed, is not a legal term; the declaration charging only *fraud*, or *careless* and *negligent* conduct, producing damage; it is an expression used by Judges and text writers, to explain what is meant by the legal terms used in the declaration. If actual fraud and malignity of design is the point of the case, then gross negligence must mean, such wanton carelessness as satisfies the jury of such corrupt design; but if — as is more frequently the case — actual fraud in fact cannot be inferred, then negligence must be considered gross or not, according to the degree in which it is *the cause* of the injury. Nearly all the confusion and uncertainty which belong to the subject of bailments, have been occasioned by the unfortunate introduction of the words *gross* and *slight negligence*, which do not belong to our law, and which convey no precise idea. The Civil Law distribution and classification of those liabilities is entirely different from ours; our law has conceived of the legal obligations and duties of men, in relation to their neighbor's property, and has, by this *action on the case*, defined them with

§ 23. May it not be fairly collected from the opinions of the most learned Judges, that as a settled principle of the Common Law, any palpable negligence in a gratuitous bailee, is *culpable* negligence; and that if a loss, in consequence, happens to the bailor, the former is liable ?[1] According to Lord Chief Justice Holt, in Coggs *v.* Bernard,[2] the *trust* is a sufficient consideration to create the obligation of careful management. Lord Ellenborough, in his address to the jury in Nelson *v.* Mackintosh,[3] says, that every person who delivers goods to another to be carried for hire, has a right to the *utmost* care, and where a person does not carry for hire, he is bound to take *proper* and *prudent* care of that which is committed to him; and if he ascertains that the article is of great value, he is bound to watch with *great* care and diligence. Lord Chief Justice Denman said, in delivering the opinion of the Court, in Hinton *v.* Dibbin,[4] "When we find 'gross negligence' made the criterion to determine the liability of a carrier [he is speaking of a common carrier,] who has given the usual notice, it might, perhaps, have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject, is any such attempt made; and it may well be doubted whether, between 'gross negligence' and negligence merely, any intelligible distinction exists." In Wyld *v.* Pickford, in the English Exchequer Chamber,[5] Parke, B., affirms, that in some of the cases, the term, "gross negligence" has been defined in such a way as to mean

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so much comprehensiveness and precision, that the same principle applies irrespectively of the seat of the possession."

[1] See opinions of Holroyd, J., in Garnett *v.* Willan, 5 B. & Ald. R. 53; of Dallas, C. J., in Duff *v.* Budd, 3 Brod. & Bing. R. 177; of Best, J., in Batson *v.* Donovan, 4 B. & Ald. R. 32.

[2] See Appendix.

[3] Nelson *v.* Mackintosh, 1 Stark. R. 237.

[4] Hinton *v.* Dibbin, 2 Adol. & Ell. R. 646.

[5] Wyld *v.* Pickford, 8 M. & Welsb. R. 460.

"ordinary negligence," or the want of such care as a prudent man would take of his own property; and, again, a common carrier, limiting his responsibility by notice, is not made irresponsible for any mistake or inadvertence, "but only for such as were made without negligence, whether gross or ordinary; and a delivery may be even grossly negligent, which is inadvertent." [1] In a still more recent case, in the same Court, Rolfe, B., remarks, — "I said I could see no difference between negligence and gross negligence — that it was the same thing, with the addition of a vituperative epithet." [2]

§ 24. If the subject-matter of the bailment consists of living animals, such as oxen, horses, or sheep, the degree of care to be exercised by a mandatary must be consistent with the character of the trust and the nature of the property, agreeably to the doctrine as above stated by Lord Ellenborough. The mandatary, therefore, in such case, is bound to give the animals a proper and reasonable amount of exercise and fresh air, and to furnish them with suitable food and nourishment, and generally to provide them with all such things as are essential to the preservation of their health; and his neglect so to do will amount to a positive breach of trust.[3] Taking charge of cattle or sheep, and afterwards taking no heed of them, but allowing them to stray away on a common, and get drowned or lost, this is a breach of trust, and the mandatary is responsible for the loss.[4] If a man turns a horse, of which he has consented gratuitously to take charge, into a dangerous pasture after dark, and the horse falls into a pit or a well, or into the shaft of a mine,

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[1] Wyld *v.* Pickford, 8 M. & Welsb. R. 462.

[2] Wilson *v.* Brett, 11 M. & Welsb. R. 113.

[3] Si un cheval soit bail a un homme a garder et apres il ne lui donc sustenance, p. q. il morust action sur le cas gist. Hil. Term, 2 Hen. 7, 9, B.; cited in Add. on Contr. 847.

[4] Hil. Term, 2 Hen. 7; 2 Hen. 7, 9, B. *ub. sup.*; Coggs *v.* Bernard, Appx.

this is gross negligence and breach of trust, and he shall be responsible for the loss.[1] One driving a sulkey for amusement, and at the request of the owner, is liable if he do not use *common prudence*, and by carelessness and negligence break the sulkey.[2]

§ 25. The true way of putting cases, where the subject-matter of a bailment is a *perishable* commodity, is to consider whether the party has omitted that care which bailees without reward are usually understood to take of property of the like nature.[3] If the mandatary of a valuable painting, for example, takes no heed for its preservation, but lets it lie on the damp ground, or places it in a kitchen, or against a damp wall in a room where there is no fire, when he might have placed it in a dry situation and in perfect security, this is an act of gross negligence ; and if the picture is seriously injured, or totally destroyed from damp or dirt, he must make good the loss, unless he can show that the mandator knew where it was placed, and assented to its being there kept.[4]

§ 26. A gratuitous bailee ought undoubtedly, therefore, to proportion his care to the injury or loss which is likely to be sustained by any want of proper care on his part.[5] This is so obvious, that it scarcely requires to be insisted on, that

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[1] Rooth *v.* Wilson, 1 B. & Ald. R. 61. If a man places a horse, of which he has consented gratuitously to take charge, in a pasture surrounded by rotten and very defective fences, and the horse, by reason thereof, strays away and is lost, this is a breach of trust, for which he shall be answerable ; but if the horse was a wild and ungovernable animal, and got away through his own recklessness and impatience of restraint, as much as by reason of the defective fences, the bailee will not be responsible. Domat, Depot. s. 3, 6.

[2] Carpenter *v.* Branch, 13 Verm. R. 161.

[3] Story on Bailm. § 67.

[4] Mytton *v.* Cock, 2 Str. R. 1099.

[5] See Story on Bailm. § 15, 186.

the degree of care which a mandatary may be required to exert, must be materially affected by the value of the property, and its consequent liability to be *stolen*. The care which would be proper as to goods of small value, and of a nature not to hold out strong temptation to theft, would not be proper for goods of great value, which do hold out such temptation.[1] Lord Stowell, in the case of The Rendsburg,[2] has put a case in point. "If," said he, "I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss, though his pocket were picked on the way. But if, instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property, so as to invite the snatch of any person he might meet in the crowded population of the town, he would be liable; because he would be guilty of the *negligentia malitiosa*, in doing that from which the law must infer, that he intended the event which has actually taken place."

§ 27. What is, and what is not gross negligence, or negligence in a gratuitous bailee, amounting to a breach of faith, is, as has already been stated, often a mixed question of law and fact,[3] but it is more generally a pure question of fact, to be determined by a jury.[4] It must be judged of, in endeavoring to apply the spirit of the law, by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of

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[1] Nelson *v.* Mackintosh, 1 Stark. R. 237.

[2] 6 Rob. R. 142, 155; and see *ante*, § 8.

[3] *Ante*, § 22; Doorman *v.* Jenkins, 2 Ad. & Ell. R. 261, per Taunton. J.

[4] Vaughn *v.* Menlove, 3 Bing. New R. 468; Beardslee *v.* Richardson, 11 Wend. (N. Y.) R. 25; Storee *v.* Gower, 6 Shep. (Me.) R. 174. How much care, the Court in this case said, will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances, which could not exactly be defined. See, also, Nelson *v.* Mackintosh, 1 Stark. R. 237; Moor *v.* Moorgue, Cowp. R. 479.

the subject-matter of the bailment, and the degree of care it seems to demand.[1] In Beauchamp *v.* Powley,[2] where the defendant, a stage-coachman, received a parcel to carry *gratis*, and it was lost upon the road, Lord Tenterden directed the jury to consider whether there was great negligence on the part of the defendant, and the jury, thinking there was, found a verdict against him. The plaintiff in Storee *v.* Gower,[3] claimed to recover a sum of money, alleged to have been inclosed in a letter, and delivered by him to the defendant, to be carried to a certain town, and left with a certain person for another person, but by the defendant converted to his own use. There was no evidence that the defendant received, or was to receive, pay for carrying the letter, or the contrary. It was the province of the jury, the Court held, and not of the Court, to decide the question, whether gross negligence was, or was not, proved; and the exceptions which had been filed against the verdict, which was for the plaintiff, were sustained. In Tracy *v.* Wood,[4] which was the case of a mandatary of money, the learned Judge said, if the jury were of opinion that the defendant omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under the circumstances, he had been guilty of gross negligence.

§ 28. As a general rule, as has been shown, a gratuitous bailee would be excused for a loss occasioned by *theft* or *robbery;* but yet, if the circumstances attending a loss alleged to have been so occasioned, are of a suspicious character, tending to throw a doubt upon the good faith of the

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[1] See *ante*, § 7, 8, 11, 16; Story on Bailm. § 11; Tompkins *v.* Saltmarsh, 14 S. & Rawle (Penn.) R. 275; Storee *v.* Gower, *ub. sup.*; Tracy *v.* Wood, 3 Mason (Cir. Co.) R. 132.

[2] Beauchamp *v.* Powley, 1 M. & Rob. R. 38.

[3] Storee *v.* Gower, 6 Shep. (Me.) R. 174, *ub. sup.*

[4] Tracy *v.* Wood, 3 Mason (Cir. Co.) R. 132.

mandatary, a jury will naturally disbelieve the theft or robbery, and treat the loss as unaccounted for and unexplained.[1] The captain of a vessel was intrusted with a seaman's chest, to be carried gratuitously from Trinidad to England, and, during the voyage, the chest was opened to see if it contained any contraband articles, and was found to be filled with money and valuables, which were taken out by order of the captain, put into a canvas bag, and deposited in the captain's own chest in his cabin, where his own money and valuables were kept. On the arrival of the vessel at Gravesend, the captain and one of the mates went ashore, leaving the vessel in charge of the other mate, and the next morning the captain's chest was missing, and was never afterwards discovered. It further appeared, that the night preceding the loss, an excise officer and two young men, belonging to the ship, had been allowed to sleep in the captain's cabin, and Lord Ellenborough left it to the jury to say, whether the captain had been guilty of negligence, telling them, that as soon as he had discovered the valuable nature of the property, he was bound to watch it with great care and diligence; and the jury being of opinion, that proper care had not been taken of the money, found a verdict for the plaintiff for the full value of the property.[2]

§ 29. In cases, therefore, of losses alleged to have been committed by theft or robbery, the circumstances, and the acts and declarations of the mandatary immediately preceding, and directly following the stealth, are of importance; direct proof being difficult, and not to be expected. The circumstances and conduct of the mandatary, it is the duty of the jury to weigh with the utmost circumspection; and the presumption arising therefrom is more or less strong, as they might appear to be natural and consistent, or otherwise.[1] Evidence is constantly adapting itself to the state of

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[1] *Ante*, § 11. [2] Nelson *v.* Mackintosh, 1 Stark. R. 237.

society and the concerns of the world, and therefore must accommodate itself to the altered mode of travelling, by stage-coaches, railroads, and steamboats, instead of (as in more early times) on horseback or in private carriages. Carriers are constantly more exposed to secret stealth in a crowded stage, railroad car, or a steamboat, crowded with passengers, where the traveller cannot keep his eye upon his own baggage, than by private conveyance. Public houses of entertainment in our large cities are generally filled with strangers, and without great circumspection, the traveller cannot avoid exposure to great risks. Hence a traveller, acting as a gratuitous carrier of the property of another, should not, it has been held, be precluded from showing how he conducted himself, and the degree of care he took of the property in his custody.[2]

§ 30. In Tompkins *v.* Saltmarsh,[3] S. delivered to T. at Georgetown, in the District of Columbia, five bank bills of five dollars each, to be conveyed to Athens, Bradford county, Pennsylvania, there to be delivered to S. The Court held, in the first place, that T. was not bound to lay aside all other business to take the direct road from Georgetown to Athens; and that it was competent for him to show, that immediately on the receipt of the bills, he proceeded to Philadelphia, to New York, and to Athens, and to show how he conducted himself, and what care he took of the property, and that his care was the usual ordinary care. The Court was also of opinion, that in excuse for the loss of the money, which had been stolen, it was proper that evidence should be received of the hue and cry raised immediately after the discovery of the loss, and the assiduous and indefatigable exertions of the

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[1] Tracy *v.* Wood, 3 Mason (Cir. Co.) R. 132; Graves *v.* Ticknor, 6 N. Hamp. R. 537.

[2] Tompkins *v.* Saltmarsh, 14 S. & Rawle (Penn.) R. 275.

[3] *Ub. sup.*

carrier in searching for the money; and though it was said, that this would have been the course of a guilty man, yet it was one which an innocent man would naturally take, and which, if he did not take, all would condemn him. The next best evidence of the proof of a thing itself, was the proof of those circumstances which would naturally attend it; and these were the production of the *cut valise*, the immediate promulgation of the theft, and pursuit of the property.

§ 31. In Tracy *v.* Wood,[1] the case was: A. undertook gratuitously to carry two parcels of doubloons for B. from New York to Boston, in a steamboat, by the way of Providence. A. in the evening (the boat being to sail early in the morning) put both bags of doubloons, one being within the other, into his valise with money of his own, and carried it on board the steamboat, and put it into a berth in an open cabin, although notice was given to him by the steward that they would be safer in the bar-room of the boat. A. went away in the evening, and returned late, and slept in another cabin, leaving his valise where he had put it. The next morning, just as the boat was leaving the wharf, he discovered on opening his valise that one bag was gone, and he gave an immediate alarm and ran up from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and on his return, the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury, whether there was not gross negligence, although the bailee's own money was in the same valise. The jury was directed to consider, whether the party used such diligence as a gratuitous bailee ought to use *under such circumstances*. They found a verdict for the plaintiff for the first bag lost, and for the bailee for the second.

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[1] Tracy *v.* Wood, 3 Mason (Cir. Co.) R. 132.

§ 32. Although, *prima facie*, in cases of the gratuitous carriage of goods for another, the bailee, when he keeps them with *the same care as he keeps his own*, of the same description, would repel the imputation of negligence, yet by the above case of Tracy *v.* Wood, it appears, that the presumption may be overcome by proofs of actual negligence, or of conduct, which, though applied to his own goods, as well as to those bailed, would be deemed negligence in bailees without hire of ordinary prudence.[1]

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[1] Story on Bailm. § 183, 185. Sir William Jones has put a case illustrating the former position in the text: — "If Stephen desire Philip to carry a diamond ring from Bristol to a person in London, and he put it with bank notes of his own into a letter case, out of which it is stolen at an inn, or seized by a robber on the road, Philip shall not be answerable for it, although a very careful, or perhaps, a commonly prudent man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage. But if he were to secrete his own notes with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, he would be bound, in case of a loss by stealth or robbery, to restore the value of it to Stephen." Jones on Bailm. 62. The other position may be illustrated by the case of Tracy *v.* Wood, Story on Bailm. § 185. And see 1 Browne, Civil Law, 383, note. In Story on Bailm. § 67, it is said, that the true way of putting questions of this nature is, to consider *whether the party has omitted that care, which bailees without reward are usually understood to take of property of the like nature;* and he refers to Tracy *v.* Wood, *ub. sup.*, and to the opinion of Lord Stowell in the case of The William, (6 Rob. R. 316,) which was a case of justifiable capture, where the captors are held responsible for due (that is, for reasonable) diligence. In that case Lord Stowell thus expressed himself: — "On questions of this nature, there is one position sometimes advanced, which does not meet with my entire assent; namely, that captors are answerable only for such care as they would take of their own property. This, I think, is not a just criterion in such case; for a man may, with respect to his own property, encounter risks, from views of particular advantage, or from a natural disposition to rashness, which would be entirely unjustifiable, in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care, which he would take of his own property, might, indeed, be considered as a reasonable

§ 33. It is undoubtedly true, as has been expressly held in North Carolina, that a bailee who undertakes gratuitously to carry money, is bound to use care and caution; and that, if he loses the money intrusted to him, but does not lose his own, it is very strong evidence, that he did not use becoming caution.[1] But it is quite clear, that gross negligence may be committed by a depositary or a mandatary, although he may have kept the property intrusted to him with *as much* care as *his own;* and this doctrine has been sanctioned by cases other than that of Tracy *v.* Wood. The very point was presented in Doorman *v.* Jenkins.[2] This was an action of assumpsit, in which it was proved that the defendant — a coffee-house keeper — having custody of money without reward, lost it, and made the following statement: — That he had unfortunately put it, with a larger sum of money of his own, into his cash box, which was kept in his tap-room; that the tap-room had a bar in it, and was open on a Sunday; but the rest of his house which was inhabited was not open on Sunday; and that the cash box, with his own and the plaintiff's money, had been stolen on that day. The Judge left it to the jury, whether the defendant was guilty of gross negligence, and told them that the loss of the defendant's

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criterion." Certainly it might, says Story, "if such character was known, and the party under the circumstances might be presumed to rely, not on the rule of law, but on the care, which the party was accustomed to take of his own property in making the deposit. But, unless he knew the habits of the bailee, or could be fairly presumed to trust to such care, as the bailee might use about his own property of a like nature, there is no ground to say, that he has waived his right to demand reasonable diligence." But in Monteith *v.* Bissell's Adm'r., Wright (Ohio) R. 411, the Judge said, that a bailee of money, without reward, was not liable, if he kept the money where he kept his own.

[1] Bland *v.* Womach, 2 Mur. (N. C.) R. 373. See also Stanton *v.* Bell, 2 Hawks, R. 145. In Anderson *v.* Foresman, Wright, (Ohio) R. 598, the Judge told the jury, that one carrying money without reward, is bound to take the same care of it that he does of his own. And see Foster *v.* Essex Bank, 17 Mass. R. 479.

[2] Doorman *v.* Jenkins, 2 Adol. & Ell. R. 256.

own money did not necessarily prove reasonable care. The jury having found for the plaintiff, it was held, first, that the question of gross negligence was properly left to the jury, and secondly, that there was evidence upon which they might find for the plaintiff.

§ 34. Again, where a gratuitous bailee put a horse of his brother into a pasture with *his own* cattle, in the night time, and by reason of a defect of fences, the horse fell into a neighboring field, and was killed; it was thought, that he was responsible to the owner, because it was gross negligence to put the horse into a dangerous pasture, to which he was unused.[1]

§ 35. It has nevertheless been deduced as a corollary from the rule often laid down in the books, that a gratuitous bailee is bound to take the same care of the thing bailed, as he takes of his own; that, if he commits a gross neglect in regard to his own goods, as well as in regard to those bailed, by which both are lost, he is not liable.[2] But, notwithstanding, says Story, the weight of the authorities referred to, they do not seem to express the general rule, in its true meaning. The Common Law upon the subject of gross negligenee, differs from that which is supposed to be the doctrine of the Civil Law; for gross negligence, although it may be sometimes presumptive of fraud, and undistinguishable from it, yet may consist of perfect innocence of intention.[3] Hence, it is no defence to a depositary, that he has

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[1] Rooth *v.* Wilson, B. & Ald. R. 59.

[2] Sir William Jones seems, in some places, so to understand the doctrine. Jones on Bailm. 31, 32, 46, 47. Bracton, also, so lays it down on the authority of the Civil Law. Bracton, Lib. 3, cap. 2, § 1; Just. Inst. Lib. 3, tit. 15, § 3; Dig. Lib. 16, tit. 3, l. 20, 32. Lord Holt has also given the authority of his great name, Coggs *v.* Barnard, App.; and he has been followed by Kent, 2 Kent, Comm. 562, 563, and note (a); Foster *v.* Essex Bank, 17 Mass. R. 479. See Story on Bailm. § 63.

[3] Story on Bailm. § 64.

acted with good faith, if in truth he has been guilty of gross negligence;[1] as appears by Tracy *v.* Wood, and the other cases above cited. In McLean *v.* Rutherford, in Missouri,[2] it was affirmed by one of the Judges, that the bailee's property sharing the fate of the bailor's, while it repels the presumption of fraud, will not in all cases excuse the bailee.[3] A man might, in respect of his own property, be willing to encounter extraordinary risks, or adventure upon mere gambling speculations, with a view to a particular advantage, or from a natural disposition to rashness, which would be entirely unjustifiable in respect to the goods of another put in his custody.[4]

§ 36. A mandatary who undertakes an office of *skill*, is bound to exercise such an amount of skill as he possesses, or such an amount of skill as by his conduct and actions, and ordinary course of employment, he holds himself out to the world to possess. An illustration of this principle is given by Mr. J. Heath. "If," says he, "a man applies to a sur-

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1 See *ante*, § 10, note.

2 Story on Bailm. § 66.

3 Per Napton, J., in McLean *v.* Rutherford, 8 Missouri, R. 109.

4 Cases may indeed be put, in which the circumstances of extreme rashness on the part of the depositor are so strong as justly to create an exception to the general rule of law, or rather a dispensation from it. As, if the depositor should knowingly intrust his diamonds or other valuables to a man notoriously weak and infirm in judgment, or to a minor without any experience or discretion, or to a man grossly negligent and prodigal in his own affairs, or subject to an absence of mind bordering on derangement, or to a person given to habitual intoxication; and from these known infirmities, the thing bailed should be innocently lost; in such case, there might be strong ground to presume, that the depositor was content to trust the party with all his faults and infirmities, and to take upon himself the responsibility, for all losses not arising from actual fraud. At least, it might fairly be put to a jury to presume a special contract in such a case, that the depositary should take the same care as he did of his own property, and no more, and he should not be responsible except for fraud. But these cases do not impugn the general rule. Story on Bailm. § 66. The William, *ub. sup.*; McLean *v.* Rutherford, *ub. sup.*

geon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence, if he undertook *gratis* to attend a sick person, because his situation implies skill in surgery. But if the patient applies to a man of different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable."[1] So, a person who rides a horse gratuitously, at the owner's request, for the purpose of showing him for sale, is bound, in doing so, to use such skill as he actually possesses; and, if proved to be a person conversant with, and skilled in horses, he is equally liable with a borrower from an injury done to the horse while ridden by him.[2]

§ 37. How far a bailee without hire, may add to his responsibility by inserting special terms in his promise to his bailor, is asserted to be a point not by any means clearly settled by the Common Law.[3] The rule of the Civil Law, as applied to a depositary, and which is considered a rule of universal justice,[4] is, that the law depends on the contract: *Si convenit, ut in deposito et culpa præstetur, rata est conventio; contractus enim legem ex conventione accipiunt.*[5] Or, as it is otherwise expressed: *Si quid nominatim convenit, vel plus, vel minus, in singulis contractibus, hoc servabitur, quod initio convenit. Legem enim contractus debit.*[6] So, by the Civil Law, the

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[1] Shiells *v.* Blackburne, 1 H. Black. R. 162.

[2] Wilson *v.* Brett, 11 M. & Welsb. R. 113.

[3] By Mr. Smith in his note to Coggs *v.* Bernard, 1 Smith's Lead. Cas. 222, Am. ed., 1847. But he refers to Kettle *v.* Bromsale, Willes, R. 118; to the observations of Sir William Jones in Southcote's case (4 Co. R. 83 b.); and to the observations of Powell, J. in Coggs *v.* Bernard, Appx.

[4] See Story on Bailm. § 81.

[5] Dig. Lib. 16, tit. 3, 1, § 6; Pothier, Traité de Depot, n. 30.

[6] Dig. Lib. 50, tit. 17, 1, 23; Jones on Bailm. 47, 48.

general responsibility of a mandatary may be varied by the special contract of the parties, either enlarging or qualifying, or limiting it, (except for the protection of himself against fraud;[1]) and the particular contract will furnish the rule of the case: *Placuit, posse rem hâc conditione deponi, mandatumque suscipi ut res periculo ejus sit, qui depositum vel mandatum suscepit.*[2] Story considers, that there is no principle of the Common Law, which would prevent a depositary from contracting not to be liable for any degree of negligence, in which fraud is really absent; and that the maxim of our jurisprudence, *modus est conventio vincunt legem*, applies to all contracts, not offensive to sound morals, or to positive prohibitions by the legislature. If a depositary, says this learned writer, should specially contract to keep the deposit *safely*, he might be liable for *ordinary* negligence, although the law would *otherwise* hold him liable only for *gross* negligence. Upon this ground, proceeds the learned writer to say, Southcote's case may, perhaps, be maintained to be good law, and not to be liable to the objection made against it in Coggs *v.* Bernard.[3] If, indeed, it proceeded upon the ground mentioned by Lord Coke, that a bailment upon a contract to keep, and to keep safely, is the same thing, it certainly is not law, and was overruled in Coggs *v.* Bernard.[4] But from the report it would seem, that the bailment was there to keep safe; and if so, then, upon that special contract, the party might have been held responsible, although he would not otherwise have been liable by the general law. This was the doctrine maintained by all the Judges in Coggs *v.* Bernard, which case proceeded mainly upon this ground.[5]

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[1] See Story on Bailm. § 32. By the Civil Law, *illud nulla pactione effici potest, ne dolus præstetur.* Pothier, Contrat de Mandat, n. 50.

[2] Dig. Lib. 17, tit. 1; Pothier, Contrat de Mandat, n. 50; and see Story on Bailm. § 182 *a.*

[3] Southcote's case, 4 Co. R. 83 b.

[4] See *ante*, § 20.

[5] See Jones on Bailm. 42 – 45.

In a later case, the same distinction was adopted by the Court,[1] in which it was held, that if a depositary should accept to keep safely, he would be responsible for losses by theft or robbery, although he would not otherwise be responsible upon the general principles of law.[2] In a case in Missouri, it has been held, that where the special promise was to drive the horses of another to a distant market, and sell them *as he would his own*, and the bailee is taken ill by the way, and so unable to take charge and dispose of them in person, he may employ an agent for such purpose, without incurring any other liability than that for gross negligence; and that, under such contract, he is not bound to dispose of the horses as a prudent man would dispose of his own.[3]

§ 38. As to the party upon whom the *burden of proof* lies, in an action by the bailor against a gratuitous bailee for gross negligence, a regard must be had to the form of the action. Where a *primâ facie* case of *trover* is made out at the trial, the rule is different from what it would be in an action of *assumpsit* or an *action on the case* founded on negligence. In the latter actions, the plaintiff must make out his case, *primâ facie* as he charges it; in the former, he may rely on an apparent conversion, or on a demand and refusal of the property, and thus put the other side on the defence. But the general principle of the Common Law is, that every man is presumed to do his duty, until the contrary is established; and on this account, in an action of assumpsit, or in action on the case founded upon negligence, the burden of proof is on the plaintiff.[4] In Graves *v.* Tick-

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[1] Kettle *v.* Bromsale, Willes, R. 118.

[2] Story on Bailm. § 32, 33.

[3] McLean *v.* Rutherford, 8 Missouri, R. 109.

[4] Story on Bailm. § 213; Williams *v.* East India Co. 3 East, R. 192. Mr. Wallace, in his very learned note to Coggs *v.* Bernard, (1 Smith, Lead. Cas. 243, Am. ed. 1847,) says, it may not be improper to note, that where *money* is the subject of bailment, *assumpsit* is the proper remedy; assumpsit in the form of *money had and received*, usually being, in case of money, a substitute alike for trespass, trover, and case; though as a substitute for

nor,[1] it was held, that where a person, as a bailee without hire, received money in a letter to be delivered to another, and there was no evidence of the manner in which the package had been disposed of, the most favorable construction was to be given for the defendant. In Beardslee *v.* Richardson,[2] it was held, that where a mandatary had received a sealed letter with money in it, to carry from New Orleans to New York, the plaintiff was not entitled to recover, without showing, either that the letter had been opened by the mandatary, or had been lost by his gross negligence, or that, on demand, he had refused to deliver it. If demanded, the mandatary would be bound to give some account of the loss, and to indemnify the plaintiff, unless he could show, that the property was lost without gross negligence on his part.[3]

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trover, there need be no previous demand. In trover, proof of demand and refusal, throws upon the defendant the burden of proving, that the property was lost or stolen. In case, the burden of proving negligence is on the plaintiff. Where the goods have not been returned or delivered, by the defendant, the most convenient way for the plaintiff to proceed, appears to be, first, to make a demand, and then to bring trover and case; the demand and refusal will cause a recovery on the former count, unless the defendant prove a loss or theft; and then upon the latter, the plaintiff will recover if he prove that negligence caused the loss; but the burden of this is upon him. In Beekman *v.* Shouse, 5 Rawle (Penn.) R. 179, in assumpsit, against one liable as a paid agent, it is said, that the course of proof is similar; that the proof of contract and delivery, puts the defendant to prove a loss, and then the plaintiff must show negligence. And see Clark & Co. *v.* Spence, 10 Watts (Penn.) R. 335; and Story on Bailm. § 107. In Dwight *v.* Brewster, the first count in the declaration was in trover; the second charged the defendants as common carriers, and stating their undertaking to carry for the plaintiff a package for hire; the third alleged an undertaking on the part of the defendants to carry for a reward, and charged them with negligence in the transportation, whereby the package was lost. 1 Pick. (Mass.) R. 50.

1 Graves *v.* Ticknor, 6 N. Hamp. R. 357.

2 Beardslee *v.* Richardson, 11 Wend. (N. Y.) R. 25.

3 In Stewart *v.* Pratt, 5 Ala. R. 114, held, if the bailee, on being aprized of the loss of money intrusted to him, refuse to pay, or deny his responsibility, the jury would be authorized to infer a demand and refusal.

§ 39. If the ground of the action is for a negligent loss of money, an action for money had and received is not the proper form. The plaintiff employed the defendant, without reward, to carry £45 to a person at Liverpool. The defendant did not deliver it, and afterwards told the plaintiff, that he had lost it in a brothel, but would repay it to him. There was no other evidence how the loss happened. In an action against the defendant for £45 had and received to his use, it was held, that the action lay independently of the promise, the defendant not having paid over the money or returned it to the plaintiff; that if a loss in the manner alleged had been proved, the action would have been for gross negligence, and not for money had and received; but that the defendant's assertion was not satisfactory proof of his own gross negligence; and the case raised so much suspicion (said Littledale, J.,) that the jury might infer a misapplication of the money. Ch. J. Denman said, that if the defendant was to avail himself of his own wrong to defeat an action which would otherwise lie, he must give clear proof of it; and that his own admissions were not such proof.[1]

§ 40. In an action of trover, if when the goods were demanded, the mandatary should state, that the property was lost by accident, or stolen from him, and should narrate all the circumstances accompanying the loss; the question would then arise, whether they ought not to be deemed a part of the case, so as to entitle the mandatary to the benefit of the statement at the trial, as a part of the *res gestæ* at the time of the demand and refusal. Although he would be so entitled, still the jury would be at liberty to disbelieve the statement, or to find the mandatary guilty of gross negligence, if the circumstances did not, in their judgment, repel it.[2] In Tomp-

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[1] Parry *v.* Roberts, 3 Adol. & Ell. R. 118.

[2] See note to § 213 of Story on Bailm.; the case of Doorman *v.* Jenkins, 2 Adol. & Ell. R. 256, the facts in which case are stated *ante*, § 33. In Storer *v.* Gowen, 6 Shep. (Me.) R. 174, which was an action of

kins *v.* Saltmarsh, this doctrine was established, in an action for *negligence* in the performance of a gratuitous undertaking to carry and deliver a certain number of bank bills; the Court holding, that the circumstances which would naturally attend the whole transaction, and the concomitant declarations of a man placed in the situation in which the defendant stood, in such a case, were of necessity proper evidence. Even in criminal proceedings, the Court said, the declarations of prisoners have been received, as in an indictment for larceny, to explain their conduct; and the jury hear the evidence and then judge for themselves, whether such declarations were genuine claims of property, though mistaken, or made to color a stealing. However good it may be, therefore, as a general rule, that nothing that a man does or says, can be given in evidence to support his own cause, it has, like other general rules and positions, exceptions; if it had not, it would be better to have no general rules. Duncan, J., who delivered the opinion of the Court in this case, concludes as follows: "I know not how even a careful and attentive man could escape, if evidence such as the plaintiff gave, of the bare delivery of the package, was to charge him with the amount admitted to be lost; if he, without benefit or reward, having undertaken to do a favor for his friend, could not be discharged for the casualty, without direct evidence how it arose, by some eye-witness. No prudent man ever would carry a letter on these terms. There is in all these cases, I admit, a difficulty, — suspicion will attach — the most upright man will feel mortification; but it is inconsistent with the state in which the law has placed the voluntary depositary, who acts for the benefit of another, to cast upon him the burden of showing exactly, by witnesses,

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assumpsit, to recover a sum of money alleged to have been inclosed in a letter, and delivered to the defendant to be carried; the Court held, that the admissions of a party are evidence to the jury equally as well what makes in his favor as against him. See also Graves *v.* Ticknor, 6 New Hamp. R. 537.

the *quo modo* he lost it, when the bailor admits, that somehow he did lose it. The facts and circumstances are all for the consideration of the jury. To keep them from them, is excluding the only light which can be shed on the conduct of the party charged with negligence alone."[1]

§ 41. In general, a mandatary can be said to have a special property in the thing bailed only when he has incurred expenses about it, and, consequently, has a *lien*. But, even when he has no special property, he may have an action for and tort done to the thing while in his possession; for, it is a general principle of the Common Law, that possession, with an assertion of right, and, in many cases, possession alone, is a sufficient title for the maintenance of an action against a mere wrong-doer; and, therefore, if a mandatary deliver goods to another person, and they receive an injury for which the mandatary would be liable over to the owner, he may recover for his own indemnity.[2] This principle, however, seems in Miles *v.* Cottle to have been deemed inapplicable to the case of a mandatary who had disobeyed the direction under which a parcel had been intrusted to him, and thereby had made himself personally responsible to the owner; first, because (it was said) he had no special property in the parcel which had been delivered to him for a purpose not fulfilled by him; and, secondly, because he had deprived the defendants of the intended hire for the carriage of the parcel.[3]

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[1] Tompkins *v.* Saltmarsh, 14 S. & Rawle (Penn.) R. 275. And see the same doctrine applied to *pawnees* in Story on Bailm. § 339.

[2] Story on Bailm. § 150, 152, § 93 *f*. As to a *lien*, *post*, § 43.

[3] Miles *v.* Cottle, 1 Lloyd & Welsb. R. 353; S. C. 6 Bing. R. 740, 743. The plaintiff in this case, had received a parcel from A., to book for London, at the office of the defendant. Instead of doing so, the plaintiff, being about to go to London in the defendant's coach, put the parcel in his own bag, containing his clothes, which was lost on the journey. The plaintiff had a verdict for the value of his own clothes. But the Court held, that he was not entitled to any thing for the loss of the parcel intrusted to him, because, at the time, he had no absolute

§ 42. As to the obligations of the mandator arising from the contract of mandate, the Common Law has, as yet, furnished no decisions which go to the point; but the doctrines of the Roman Law on the point are not unworthy attention, and have accordingly received the attention of the learned author of the "Commentaries on the Law of Bailments," and who states the Roman Law to be; First, if the bailor contemplates any thing to be done on his goods, by which the mandatary may or must incur expenses, he is bound to reimburse him; for it can never be presumed, that a gratuitous trust is designed to be a burden to the mandatary. Secondly, as to indemnity for incidental contract made by the mandatary. This is obviously founded on the same general principles of justice, and the presumed intention of the parties, as the reimbursement of expenses. Thirdly, another question is, how far the mandator is bound to indemnify the mandatary for any losses or injuries, sustained by him in the execution of the trust. The general rule of the Civil Law seems to be, that the mandator is bound to indemnify the mandatary against all losses and injuries, the proximate cause of which can be directly traced to the execution of the mandate; but not for losses and injuries, of which the mandate was merely the occasion.[1] How far, says the learned author above referred to, any of these doctrines are, or would be, adopted in our law, cannot be satisfactorily answered by adjudged cases, for none can be found. But it is laid down by another late writer, that in the Common Law, if the mandatary must necessarily incur expense in the execution of the commission intrusted to him, he is clothed with an implied authority from the mandator to defray such expenses; and all money necessarily laid out by him in that behalf, is money expended for the use of the mandator at his (implied) request; for the recovery whereof the ordinary action for

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special property in the parcel, as the bailment had terminated by his own misfeasance.

[1] Story on Bailm. § 197, 198, 199, 200.

money paid is maintainable by the mandatary. Thus, if a party requests a friend[1] to carry goods for him in a stage-coach, to another town, for which goods carriage hire is usually paid, a like duty to pay the bill is presumed.[2]

§ 43. The French Law accords to the mandatary a right to detain the chattel until he has received payment of the expenses he has incurred in the execution of the trust concerning it.[3] In the Common Law no such right exists, and no *lien* is permitted to be claimed by one man upon the property of another for the expenses attendant upon the execution of a gratuitous commission.[4]

§ 44. In conclusion of the present chapter, it may be proper to notice the several reasons which have been assigned why actions at Common Law on the contract of mandate, have been uncommon. The reason given by Sir William Jones, is, that it is very uncommon for a person to undertake any office of trouble without compensation.[5] "But, perhaps," says Story, "a large survey of human life might have furnished a more charitable interpretation of this absence of litigation; first, because, from the great facilities of a wide and cheap intercourse in modern times, there is the less reason to burden friends with the execution of such trusts; and secondly, because, in cases of loss, there is an extreme reluctance, on the part of bailors, to make their friends the victims of a meritorious, although, it may be, a negligent kindness." [6]

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[1] The case put by Story on Bailm. § 197.

[2] Addison on Contracts, p. 849.

[3] Domat, Lib. 16, tit. 3; Lib. 1, tit. 15; Pothier, Contrat de Mandat.

[4] Add. on Contr. 850; Sanderson *v.* Bell, 2 Cr. & My. R. 304. And see Chapman *v.* Allen, Cro. Car. R. 271; Jackson *v.* Cummins, 5 M. & Welsb. R. 342; Judson *v.* Etheridge, 1 Cr. & My. R. 746.

[5] Jones on Bailm. 57.

[6] Story on Bailm. § 218.

CHAPTER III.

OF CARRIERS FOR HIRE, WHO ARE NOT COMMON CARRIERS.

§ 45. It is proposed to consider next the liability of carriers *for a reward*, who are not common carriers. The liability of the *mandatary*, or carrier without reward, it appears by the preceding chapter, is derived from his undertaking, which, being *gratuitous*, excuses him in the absence of that aggravated degree of negligence, which the writers denominate "gross" negligence; but when the liability of a carrier arises from *his reward*, and he is not a *common* carrier, he is bound to "ordinary" diligence, and is responsible for "ordinary" neglect, which is the fixed mode or standard of diligence and of neglect.[1] The latter sort of bailment, it has appeared, is called *Locatum* or hiring, which is always for reward; and is that branch of it denominated *Locatio operis mercium vehendarum*;[2] and the trust being reciprocally beneficial to the bailor and the bailee, the law exacts ordinary diligence on the part of the latter, and makes him responsible for ordinary neglect, and for that only.[3] All

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[1] See *ante*, § 9, 10, 11.

[2] See the different sorts of bailments, *ante*, § 13.

[3] See *ante*, § 11, 15. There is a marked difference in cases where ordinary diligence is required, and where a party is only accountable for gross neglect. Ordinary neglect is the want of that diligence, which the generality of mankind use in their own concerns; and that diligence is necessarily required where the contract is reciprocally beneficial. Per Duncan, J., in Tompkins *v.* Saltmarsh, 14 S. & Rawle (Penn.) R. 280. When goods are delivered to a carrier, the implied contract is to carry safely. Raphael *v.* Pickford, 2 Dowl. R. (N. S) 916. A laundress sent linen which she had washed to the owner, by a carrier whom she

depositaries for hire (*Locatio custodiæ*,)[1] such as warehousemen, wharfingers, &c., who are bailees upon a contract of mutual interest, stand upon the same footing as persons contracting for the carriage of goods for hire, who are not common carriers: and if they act with ordinary diligence and good faith, they are protected.[2] The contract entered into by a booking-office keeper, who takes parcels to be forwarded by carriers, is bound to ordinary diligence, and to that only, for their safe delivery.[3] A booking-office keeper, who also kept a wine vault, was held liable for the omission of ordinary diligence for allowing goods to remain in front of the bar, exposed to persons coming in for liquor, even although they were of too large a size to be conveniently taken into the bar, behind the counter.[4] Want of ordinary care will render liable, in Maine, the owners of a *boom* for the loss of logs secured thereon.[5]

§ 46. The difference with respect to the degree of liability, between a *private* carrier for hire, and a *common* carrier, (whose undertaking is always for hire,) is, that the latter is bound to deliver the goods intrusted to him against *all events*, but the acts of God and the public enemy. The responsibility which is founded merely upon the reward, is not incurred when a certain degree of diligence has been used, whereas that which is imposed by the Common Law upon the common carrier, is derived mainly from his public employment,

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paid; the carrier having lost it, it was held, that the laundress was entitled to sue the carrier for the loss. Freeman *v.* Birch, 3 Ad. & Ell. R. (N. S.) 483.

[1] See *ante*, § 14; Jones on Bailm. 97.

[2] Jones on Bailm. 87; Story on Bailm. § 442 *et. seq.*; Thomas *v.* Prov. & Boston Railr. Co. 10 Met. (Mass.) R. 472; Foote *v.* Storrs, 2 Barb. (N. Y.) R. 326; McHenry *v.* Railr. Co., 4 Flarring. (Del.) R. 448. See *post*, § 75.

[3] Gilbert *v.* Dale, 1 Nev. & Per. R. 22; 5 Ad. & Ell. R. 543.

[4] Dover *v.* Mills, 5 C. & Payne, R. 175.

[5] Penobscot Boom Corp. *v.* Baker, 4 Shep. (Me.) R. 233.

and is not avoided by any quantity of diligence. Another distinction which has been made between persons undertaking the carriage of goods for hire, and to be responsible for their safe delivery, is, that a private carrier is not obliged, like a common carrier, to undertake in that way. All persons who carry under a special contract, as the driver of a stage-coach occasionally taking packages to carry for compensation, are private carriers.[1] Or, as in Satterlee *v.* Groat,[2] a person who sends his servant to transport goods belonging to another person, from one place to another, with special instructions not to take the goods of any other person, incurs no other liability than that of a private carrier for hire, in case of the loss of the goods. But as to who are common, as distinguished from private, carriers, and as to the peculiar character and responsibility of the former, the reader is referred to the chapters following; the object at present being to consider the liability of such persons only who carry for hire, and who are not common carriers. Any person carrying for hire, who does not come within the definition and explanation to be given of a common carrier, is a private carrier, and therefore bound to only ordinary diligence.[3]

§ 47. *Ordinary diligence*, to which a private carrier for hire is bound, is such diligence as every prudent man commonly takes of his own goods,[4] and *ordinary negligence* is therefore the want of such diligence.[5] As it is ordinarily a good defence for a private carrier for hire, that the loss or injury to the goods was occasioned by *unavoidable* accident,[6] or by such means that he could not have guarded against it

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[1] Beekman *v.* Shouse, 5 Rawle (Penn.) R. 179; Sheldon *v.* Robinson, 7 N. Hamp. R. 157.

[2] Satterlee *v.* Groat, 1 Wend. (N. Y.) R. 272.

[3] See Ross *v.* Hill, 2 Man. Grang. & Scott, R. 877.

[4] See *ante*, § 6, 9, 11.

[5] See *ante*, § 10.

[6] See Greenl. Ev. § 219.

by any ordinary diligence,[1] he will not be liable for any loss by *robbers*, or from any taking from him or his servants by *force*.[2] According to Lord Holt, in Coggs *v.* Bernard, if a bailiff or factor carries goods, and is robbed, he is not answerable to the owner, although he is to be paid for his service, "because it is only a particular office and private trust, and he doth the best he can, as the nature of the thing puts it in his power to perform it."[3] This doctrine has been recognized in the modern case of Brind *v.* Dale,[4] by Lord Abinger, who considers, that "if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good all losses arising from the negligence of his servants, although he would not be liable for losses by thieves or by any taking by *force*."

§ 48. But the propriety of the distinction taken in the Civil Law between a public palpable robbery by *force*, and a *secret* theft or purloining of goods, is obvious. It is, that in the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery;[5] it being very sensibly considered, that individual vigilance could avail but little against the open attack of the determined robber.[6] In the other case, he was bound to make good the loss, unless he could show, that he had taken the greatest care of the thing intrusted to him; and that it had been purloined,

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[1] Per the Court, by Bronson, J., in Hollister *v.* Newman, 19 Wend. (N. Y.) R. 239. And see Hodgson *v.* Fullarton, 4 Taunt. R. 487; Hatchwell *v.* Cooke, 6 Ib. 577; Beekman *v.* Shouse, 5 Rawle (Penn.) R. 179.

[2] Story on Bailm. § 457.

[3] Coggs *v.* Bernard, Appx.

[4] Brind *v.* Dale, 8 C. & Payne, R. 207.

[5] Dig. Lib. 17, tit. 2, lex 52, 53; Inst. Lib. 3, tit. 15, § 2, 3; cited in Add. on Contr. 773.

[6] Adversus *latrones* parum prodest custodia; adversus furem prodesse potest si quis advigilet. Gothofred, Jur. Civ., cited in Jones on Bailm. 44.

notwithstanding every precaution for its safety.[1] There are cases in which it has been considered, that, by the Common Law, a loss by secret purloining of goods in the hands of a carrier for reward, is *primâ facie* evidence of a want of ordinary diligence in keeping, and this presumption the carrier must rebut by showing that he had observed ordinary diligence, or, in other words, that he had taken all such precautions as appear to be necessary to guard against the theft. In an action against the commander of a ship of war for the loss of a quantity of bullion, the plaintiff declared, that in consideration that he had caused to be delivered to the defendant certain casks of dollars, to be carried on a voyage from the river Plate to London upon freight for certain hire and reward, the defendant undertook to take care of them, and assigned for breach, that he took so little care of them, that they were lost; and it appeared on the trial, that on the arrival of the ship in the Thames, two of the casks had been opened and plundered by the crew; it was considered, that the very occurrence of the loss was *primâ facie* evidence of negligent keeping on the part of the defendant, and it was held, that he was responsible for the loss.[2]

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[1] Ad casus, autem, fortuitos non sunt referendi illi casus qui cum culpâ conjuncti esse solent; cujusmodi sunt *furta*. Quamobrem, qui rem *furto* amissam dicit, *si diligentiam suam probare debet*. Vin. Com. ad Inst. lib. 3, tit. 15, § 5; Pothier, Pret. à Usage, art 53; Robinson *v.* Ward, Ry. & Mood. R. 276; and see Add. on Contr. 773.

[2] Hodgson *v.* Fullarton, 4 Taunt. R. 787; and see also Hatchwell *v.* Cooke, 6 Ib. 577. Sir William Jones has given an opinion, that a loss by private theft is presumptive evidence of ordinary neglect. Jones on Bailm. 38, 40, 66, 77, 109. But Story has endeavored to prove, that the Common Law warrants no such presumption as Sir William Jones supposes. "Abstractedly speaking," says he, "there is nothing in the case of theft from which we have a right to infer, that, because a loss has happened by it, there must have been some neglect (Vere *v.* Smith, 1 Vent. 121; S. C. 2 Lev. 3.) On the contrary, no degree of vigilance will always secure a party from losses by theft. A store may be broken open however securely locked; a person may be robbed while riding in a stage-coach, or while asleep; a servant may be faithless, and betray the

§ 49. It is not only in the case, as in the above case, o the carriage of merchandise on the high seas, that the loss o goods in a port or harbor, affords a *primâ facie* presumption of negligence and want of care, and that the undertaker of the work of carrying, in order to escape from responsibility in respect of such loss, must prove that he had taken proper care of the goods intrusted to him, and must show, that the loss was occasioned by a forcible robbery, which he could not resist; but in the case of the carriage of valuable chattels by land, the person who receives them to be carried by him for hire, cannot set up a mere loss of the property by the way, as an answer to an action for the non-delivery of them according to his undertaking. Thus in an ancient case, where the declaration, in an action of assumpsit, alleged, that the plaintiff delivered to the defendant £3, to be carried

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confidence reposed in him; a person may be seized with a sudden fit, or alienation of mind, and the theft committed without any consciousness on his part. In these and in many other cases there would not be any presumption of neglect. And the Civil Law itself supposes, that, in such cases, the bailee might repel the imputation of negligence. By our law, in many cases, a bailee is excusable when the loss is by theft; but never when that theft is occasioned by gross negligence. So long ago as the reign of Edward the Third (29 Assisarum, 28,) it was held, that, if a person bail his goods to keep, and they are stolen, he is excused. The reasoning of the Court in Coggs *v.* Bernard shows that the Court did not consider theft as *primâ facie* presumptive of negligence. In short, our law considers theft, like any other loss, to depend for its validity as a defence upon the particular circumstances of the case, and to be governed by the general nature of the bailment, and the responsibility attached thereto. It neither imputes the theft to the neglect of the party, nor, on the other hand, exempts him from responsibility from that fact alone. But it decides upon all the circumstances, as leading to the conclusion, that there has or has not been a due degree of care used." Finucane *v.* Small, 1 Esp. N. P. C. 315; Story on Bailm. § 39. Now, it may be observed, that the concluding remark, which is a summary of the argument preceding it, expresses Sir W. Jones's opinion, with which also the whole argument so well agrees, that it is difficult to discover any difference between them. The difference, if any, is at most merely formal. See note to Theobald's edition, Jones on Bailm. p. 43.

to an inn, in Southwark; that the defendant, in consideration of the premises, and for that the plaintiff did undertake "reasonably to content him for the carriage," promised safely to convey it thither, and deliver it at the said inn to the plaintiff, but that he had not done so; it was held, that the defendant, who had accepted, the money to be carried, was liable upon such a promise, although he was not a common carrier, and although no sum certain had been agreed to be paid him as the price of the carriage.[1] Thus also, in a very modern case, where a traveller hired a cab for the conveyance of himself and his luggage to the Great Western Railway station at Paddington, and the luggage was placed on the outside of the cab, but on the arrival of the vehicle at the railway station, a portion of it was found to be missing; it was held, that the law would imply from the acceptance of the luggage by the cabman to be carried, together with the passenger, for hire, a promise from him "safely and securely" to carry it, and that he was responsible for the portion of it lost by the way.[2]

§ 50. The very occurrence of loss or damage to the goods delivered to a private bailee for hire, seems, therefore, to be cogent evidence of want of care. Thus, where a puncheon of rum was staved by the servants of the defendant whilst it was being lowered into the hold of a vessel, and the contents were scattered and lost, the very occurrence of the disaster was considered to be an irresistible proof of negligence in the execution of the work.[3] In Mackenzie *v.* Cox, at Nisi Prius,[4] it was held, that if A place a dog with B, and the dog be received by B to be kept by him for reward,

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[1] Rogers *v.* Head, Cro. Jac. R. 262.

[2] Ross *v.* Hill, 15 Law J., N. S. (C. P.) 182; S. C. 3 Dowl. & L. R. 788.

[3] Goff *v.* Clinkard, cited 1 Wils. R. 283; and see Coggs *v.* Bernard, Appx.

[4] Mackenzie *v.* Cox, 9 C. & Payne, R. 632.

to be paid to him by A, B is not answerable for the loss of the dog if he took reasonable care of it; but if the dog be lost, the *onus* lies on B to acquit himself by showing that he was not in fault with respect to the loss.

§ 51. But in most cases, the question of ordinary negligence is more a question of fact to be determined by the jury, than of law;[1] and, as has been fully explained, depends much upon particular facts and circumstances, and upon the customs and habits of the age or country, the nature and value of the property, &c.[2]

§ 52. *Agisters of cattle*, like private carriers for hire, come within the rule of responsibility of ordinary negligence;[3] and very slight evidence of neglect has been sufficient to induce juries to return verdicts in favor of those who have sought compensation for the loss of cattle delivered to bailees to be kept for hire. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed away and was lost, and never after heard of, and the plaintiff gave evidence of the *gates having been occasionally seen left open, and the fences being in part out of order*, but it did not appear, that the horse had strayed through any defect in the fences, or through any of the gates left open; the jury, nevertheless, returned a verdict against the defendant for the full value of the horse.[4]

§ 53. In the case of Beck *v.* Evans,[5] the plaintiff had sent a cask of brandy by the defendant's wagon from Shrewsbury to London. Before the wagon reached Birmingham, the

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[1] As in the question of gross negligence, see *ante*, § 22, 27, 28, 29.

[2] See *ante*, § 7, 8, 11, 16; Walker *v.* Jackson, 10 M. & Welsb. R. 161; Green *v.* Hollingsworth, 5 Dana, (Ken.) R. 173.

[3] Story on Bailm. § 443; Jones on Bailm. 91, 92.

[4] Broadwater *v.* Blot, Holt, Ni. Pri. R. 547. And see *ante*, § 21; and Mosley *v.* Fosset, 1 Roll. Abr. 4, per Popham, C. J.

[5] Beck *v.* Evans, 16 East, R. 244.

cask was leaking fast, and the driver was informed of it; he delayed three hours at Birmingham, without attempting to stop it, passed through Wolverhampton, where he made some stay, and at the next stage beyond Wolverhampton, having some parcels to deliver, he took the cask out, and the remainder of the brandy was saved. It was left to the jury to consider, whether the injury arose from the negligence of the defendant's servant, the wagoner, in not examining the cask after he was informed of its leaky state, at either of the places where he halted; which being found in the affirmative, a verdict was taken for the full amount of the loss. A rule to set aside this verdict on the ground of the misdirection of the Judge, was moved for, and refused, in the Court of King's Bench.

§ 54. In England, at least, the doctrine is clearly settled, that a *common* carrier may limit the extraordinary liability which the law imposes upon him as such, by a special acceptance that he will not be liable, or by a public notice to that effect, of which the owner of the goods has knowledge; and in such cases, the common carrier descends to the situation of a private carrier for hire, and it is therefore enough to prove *ordinary negligence*, to render him liable in case the goods are lost or damaged in consequence.[1] In a case in the Exchequer, the defendants, who were the proprietors of a public stage coach, and had published the usual notice limiting their liability as common carriers, received from the plaintiff a valuable bank parcel, to be conveyed from Hertford to Brecon, for which they were paid the usual hire. When the coach arrived at Brecon, the driver was in liquor, and although the entry in the way-bill was known to the book-keeper, no search or inquiry was made for the parcel, and it was in consequence lost. The jury having found,

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[1] Wild *v.* Pickford, 8 M. & Welsb. R. 461, and Hinton *v.* Dibbin, 2 Adol. & Ell. R. 646.

that there was gross negligence on the part of the defendants, they forfeited the benefit of the notice, and were obliged to make good the whole loss. Baron Graham said, that he "perfectly agreed with the counsel for the defendants, that they would not have been liable, if ordinary diligence had been used;" so that it was for the omission of this diligence, (which is the definition already given of ordinary neglect,[1]) that made them liable.[2]

§ 55. In Smith *v.* Horne,[3] a parcel had been sent from Worcester to London, by the defendant's coach. It arrived in London, and was taken from the defendant's office in a cart, under the direction of one person only, (it being the usual practice to employ two persons for that purpose.) This man left the cart unprotected in the street, while he went to different houses to deliver other packages. Notwithstanding the notice of the defendant as a common carrier, he was held liable, like a private carrier for hire, for the full value.

§ 56. It seldom happens, that persons undertake the carriage of goods for hire, who are not common carriers, and the rule in respect to common carriers, is, as has already been stated, that they are not excused in case of loss of, or injury to the goods, except by the act of God or the public enemy. But if the loss or injury by such means, is conduced by their negligence or want of skill, or by insufficiency of vehicle, they do not come within those two exceptions. Many of the authorities, therefore, which will be cited, in a subsequent chapter on the responsibility of common carriers,[4] are illustrative of the general doctrine of liability in these

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[1] *Ante*, § 10.

[2] Bodenham *v.* Bennett, 4 Price, R. 31.

[3] Smith *v.* Horne, 8 Taunt. R. 144; 5 B. & Ald. R. 57.

[4] Chap. VI.

cases, and, therefore, they will be found to illustrate the law applicable to private carriers for hire.

§ 57. It is a well settled principle, that if the owner of the goods in the hands of a private bailee, should in any way conduce to the loss, or the loss is as likely to have arisen from the misconduct of the owner, or his want of care, the carrier is not responsible for the loss. This is a rule which of course should apply to all bailees for hire, and has in fact been applied to a warehouseman. Thus, where a quantity of ginseng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box, and ordering the lid to be taken off for the purpose of showing the ginseng to expected purchasers, who came to the warehouse to view it, on the invitation of the plaintiff, and *rats* got into the box and destroyed the ginseng; it was held, that the defendant, the warehouseman, was not responsible for the loss.[1] On the same principle, if the owner of the goods in the hands of a private carrier accompanies the goods to take care of them, and is himself guilty of negligence, by which the goods are lost; or if there is as much reason to attribute the loss to the negligence of the one party as the other, the carrier is not liable.[2] In Whalley *v.* Wray,[3] the damage complained of happened distinctly by the owner's neglect. This was an action of assumpsit against the defendant, as a lighterman, for damage done to the plaintiff's goods, which had been intrusted to him to be deposited in the plaintiff's warehouse; and the facts of the case were, that before the goods could be permitted to be

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[1] Cailiff *v.* Danvers, 1 Peake, N. P. C. 155. As to destruction caused by *rats*, see *post*, Chap. VI. A carrier for hire, who is also a warehouseman, may be responsible in the latter character, for the loss of the goods after he has deposited them in his warehouse. Cairns *v.* Robins, 8 M. & Welsb. R. 258.

[2] Per Lord Abinger, in Brind *v.* Dale, 8 C. & Payne, R. 207; and see Robinson *v.* Dunmore, 2 Bos. & Pull. R. 417.

[3] Whalley *v.* Wray, 3 Esp. R. 74.

landed, it was necessary to present a petition to the commissioners of the customs, who refer it to the land surveyor, upon whose report the goods are permitted to be landed. A petition had been presented by S., who was the custom-house agent, to the plaintiff; but no report having been made of it, the land surveyor refused to permit the goods to be landed; in consequence of which, they remained in the lighter undischarged, where they received the damage for which the action was brought. The presenting of the petition, &c. was usually done by the custom-house agent of the party to whom the goods belonged, and was not usually done by the lighterman. By Lord Eldon: "To entitle the plaintiff to recover, it must appear that the loss happened by the neglect of doing that which was the regular and common duty of the defendant. The law raises no presumption of what is his duty; that is a matter of evidence; here it is in evidence, that the presenting the petition, and the subsequent proceedings, was the business of the custom-house agent of the plaintiff, not of the lighterman; if there had been any contract, or undertaking, on the part of the lighterman, by the neglect of which the goods were spoiled, it should have been the object of a special count; the plaintiff has relied on the general liability of the defendant, without making it out in evidence, that it was the duty of the defendant to have done that, from the neglect of which the loss has arisen." But whether the loss did proceed from the negligence of the owner of the goods, or whether it may have so proceeded, may sometimes be a question to be submitted to the jury, with the circumstances attending the particular case.[1]

§ 58. A bailee for reward is liable for injury to goods occasioned by his negligence, although it appear that after thus happening of the injury, the goods were destroyed without his fault, and that they must have been so destroyed, even if

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[1] Bowman *v.* Teall, 23 Wend. (N. Y.) R. 306.

no damage had previously occurred. In an action on the case against a warehouseman, it appeared on the trial, that several boxes of furniture, clothing, &c. belonging to the plaintiff, were deposited with the defendant, a warehouseman and oil merchant, to be stored for hire. The goods were placed in a lower room of the defendant's store, and while remaining there were seriously injured by the drippings of the oil from leaky casks in the second story. Afterwards the goods were destroyed by a sudden freshet, which caused the water of the river near to which the warehouse stood, to rise and flow into the room where they were deposited. Every exertion was made by the defendant's servants to save the goods from injury. It was held by the Court, that the defendant was no more released from his liability for the injury done by the oil, through his negligence, before the flood, than he would have been, under like circumstances, if he had carelessly permitted the goods to be stolen or burned. In such a case, he might have contended with as much propriety as in the case in question, that he ought not to be held responsible for the consequences of his own neglect, because the goods would have been destroyed by the flood, if no loss or damage had previously occurred. It could not be denied, that a cause of action to recover the full amount of damages that had already been sustained, existed before and at the time of the destruction by the flood; and unless, the Court held, the defendant could find some principle which would enable him to plead the flood in bar of an action of his own previous wrong, his liability must continue. The flood might excuse the defendant for injuries happening through its agency, but nothing further.[1]

§ 59. Although the degree of care required of a private person who undertakes the carriage of goods for hire, extends only to the responsibility for ordinary negligence, yet that responsibility may be increased or diminished by *special*

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[1] Powers *v.* Mitchell, 3 Hill (N. Y.) R. 545.

contract.[1] In the first place, it may be increased, so as to render the carrier liable to the same extent even as a common carrier, by his particular *warranty*. In Robinson *v.* Dunmore,[2] the plaintiff, an upholsterer, delivered to the defendant to carry for hire, with a horse and cart, some furniture into the country; and the plaintiff having observed, that the tarpaulin which the defendant had brought for the purpose of covering the cart was too small, the defendant said, "I will warrant the goods shall go safe." In the course of the journey the goods were damaged by rain, and a verdict was found for the plaintiff, under the direction of Lord Elden, Ch. J. On a motion that the verdict might be set aside and a nonsuit entered, the verdict was held right. Heath, J. observed: — "The defendant in this case is not charged as a common carrier; he is charged on a special undertaking; and the jury have found on good grounds, that the undertaking stated in the declaration was made by the defendant. They had decided, upon considering the whole transaction, that the words used by the defendant amounted to a warranty, and we cannot say that they have done wrong." Chambre, J. considered it a very clear case, and said: — "The defendant is not a common carrier by trade, *but has put himself into the situation of a common carrier by his particular warranty*." It was further held, that the circumstance that the plaintiff sent one of his own servants in the defendant's cart to look after the goods, made no difference; as it was more for the plaintiff's interest that the property should not be lost, than that he should have an action against the carrier.[3] In the second place, the implied liability

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[1] See on this subject, *ante*, § 37; Jones on Bailm. 97; and see the Civil Law compared with the Common Law on the subject, Story on Bailm. § 33, 34, 35, § 68 to 74; Brind *v.* Dale, 8 Car. & Payne, R. 207; *post*, Chap. VII. as to the limitation of a common carrier's liability by special contract.

[2] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 417.

[3] And see Cayle's case, 8 Co. R. 33. When the *law* creates a duty or charge and the party is disabled to perform it, without any default in him,

of a private carrier for ordinary diligence, may be diminished, by special agreement or acceptance. In Alexander *v.* Green,[1] it was held, that a contract to tow a boat, "at the risk of the master and owners thereof," did discharge the paid undertaker from liability, for every risk arising from a want of ordinary skill; but that no man could, by any contract, exempt himself from liability for his *fraudulent* acts.[2] Indeed there is no reason why bailees, (at least other than common carriers,) may not contract either for a larger or a more restricted responsibility than that which the law imposes upon them in the absence of any special contract. They may become insurers against all possible hazards, or they may say we will answer for nothing but a loss happening through *fraud*, or want of good faith.[3] Where the defendants contracted for hire to take a vessel through the ice out of the harbor of B., and there was no express agreement, that they should be responsible for any loss or injury which might happen, if the vessel was not carried through in safety, the defendants were bound to reasonable diligence.[4]

§ 60. But even an express promise by a private carrier to

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and has no remedy over, then the law will excuse him. But when a party, by *his own contract*, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity. See opinion of Rogers, J., in Hand *v.* Baynes, 4 Whart. (Penn.) R. 214; Alleyn, R. 27; Hadley *v.* Clark, 8 T. R. 259; Brecknock & Abergavenny Canal Navigation (case of,) 6 T. R. 750.

[1] Alexander *v.* Green, 3 Hill (N. Y.) R. 9.

[2] See *ante*, § 37, and as to *fraud*, see *ante*, § 10, 35.

[3] Wells *v.* Steam Navigation Co. 2 Comst. (N. Y.) R. 204. The responsibility of a public receiver depends on his special contract, and not on the law of bailments; and in a case where his special contract was to pay over the amount received, it was held to be no defence by his surety that the money was stolen, though the jury find it was kept as a prudent man would keep his own funds. Commonwealth *v.* Comly, 3 Barr. (Tenn.) R. 372.

[4] Penn. Del. and Md. Steam Nav. Co. *v.* Dandridge, 8 G. & Johns. (Md.) R. 248.

carry goods *safely*, is but the undertaking implied by law to carry them free from ordinary negligence, and does not insure against losses by robbers or any taking by force.[1] Blackstone lays down the rule, that "if the bailee undertakes specially to keep the goods safely and securely, he is bound to the same care as a prudent man would take of his own;"[2] that is, he is bound to ordinary diligence. Indeed the words "safely and securely" are always to be construed with reference to the promise implied by law from the peculiar relation of the parties, and not in their more literal sense. In assumpsit against a cab proprietor, the declaration stated, that the plaintiff hired the vehicle, and that in consideration of the premises, and that the plaintiff with his luggage would become a passenger and of a certain reward, the defendant promised the plaintiff to carry and convey him and his luggage "safely and securely," from &c. to &c., and alleged a loss of part of the luggage by the negligence of his servant. It was held, that the declaration was sufficient to charge the defendant for a breach of his implied duty to use an ordinary degree of care, the words "safely and securely," not necessarily importing a more extended liability.[3] In this case Tindal, C. J. said, that it could only be argued and inferred from the cases, that "we are to construe these words '*salvo et secure*' with reference to the duty or the promise implied by law from the particular position and relation of the parties, and not in the stricter sense contended for on the part of the defendant. In the present case, the plaintiff hired a cab to convey himself and his luggage to a certain place. The

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[1] Story on Bailm. § 457, § 33, and *ante*, § 20, 37.

[2] 2 Black. Comm. 452. The learned Judge, who delivered the opinion of the Court in Foster *v.* Essex Bank, 16 Mass. R. 479, seemed to think, that there is much to warrant the suggestion, that, in a case, where the bailment is to keep safely, the depositary would not be liable for a loss by theft, unless it should arise from his own negligence and want of due diligence and care; and see Whitney *v.* Lee, 8 Met. (Mass.) R. 91.

[3] Ross *v.* Hill, 2 Man. Grang. & Scott, R. 877.

undertaking charged in the declaration, 'safely and securely' to convey the plaintiff with his luggage to his destination, means no more than safely and securely *with reference to the degree of care which, under the circumstances*, the law required of the defendant; that is, that he shall use such a reasonable degree of care, that the plaintiff shall incur no damage or loss through his, the defendant's, negligence or default. If it had appeared, that the defendant was a common carrier, his duty would have been to carry and deliver safely, at all events, without excuse, unless prevented by the act of God or the Queen's enemies. If, on the other hand, he had been a mere gratuitous bailee, then a less degree of care and caution would have been required of him than is required from a bailee for reward. The words 'safely and securely,' therefore, receive different interpretations with reference to the character in which the defendant is charged. I cannot help thinking, that this was expressly decided in Coggs *v.* Bernard." [1]

§ 61. According to the opinion of Lord Abinger in Brind *v.* Dale,[2] in cases of the carriage of goods for hire, by persons who are not common carriers, the *onus probandi* is on the plaintiff to show, that the loss has been by the negligence of the carrier or his servants. But in fact, there are discrepancies in respect to depositaries for hire in general, whether the *onus probandi* for negligence lies on the plaintiff, or of exculpation on the defendant, in an action for the loss.[3] In some cases in England, it has appeared, that the latter rule is maintained; [4] yet in cases, other than in the one of Brind *v.* Dale, the *onus* of proving negligence lies on the plaintiff.[5] In this country it is considered, that the weight

[1] Coggs *v.* Bernard, Appx.

[2] Brind *v.* Dale, 8 Carr. & Payne, R. 207.

[3] See Story on Bailm, § 454.

[4] *Ante*, § 48, 49, 50.

[5] It has been ruled in England in case against a depositary for hire, that proof merely of the loss, where the goods were stolen by his servants, is

of authority coincides with the opinion, that the burden of proof is on the plaintiff, although an inclination of opinion has sometimes been expressed the other way.[1] With regard

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not sufficient to put the bailee on his defence; and that the burden of proof of negligence is on the bailor. Finacune *v.* Small, 1 Esp. R. 314. In another case, in an action against a pawnee for a negligent loss of the pawn, it is held, that it is incumbent on the plaintiff to support the allegations of his declaration by competent proofs, and the burden of proof, in respect to negligence, is thrown on him. Cooper *v.* Barton, 3 Camp. R. 5. In Harris *v.* Packwood, 3 Taunt. R. 264, which was the case of a special acceptance by a common carrier, but who yet was held liable for actual negligence, Lawrence, J. charged the jury, that the *onus* of proving care lay with the defendant; but the Court held otherwise, on a motion for a new trial; and that express negligence must be shown by the plaintiff. This case is understood as going that length by Abbott, C. J., in Marsh *v.* Horne, 5 B. & Cr. 322. A similar case is reported in 1 H. Black. R. 298, Clay *v.* Willan.

[1] Story on Bailm. § 454. That negligence must be shown by the plaintiff, is maintained in Newton *v.* Pope, 1 Cow. (N. Y.) R. 109. In Platt *v.* Hibbard, 7 Cow. (N. Y.) R. 497, Walworth, the Ch., told the jury, that in all cases of bailment of property to one who carries on the business of receiving it into his custody for reward, it is necessary that a strict rule should be enforced against the bailee to prevent fraud. Hence, when property intrusted to a warehouseman, wharfinger, or storing and forwarding merchant, in the ordinary course of business, is lost, injured, or destroyed, the weight of proof is with the bailee, to show a want of fault or negligence on his part; or, in other words, to show the injury did not happen in consequence of his neglect to use all that care and diligence on his part, that a prudent or careful man would exercise in relation to his own property. In Clarke *v.* Spence, 10 Watts (Penn.) R. 335, Rogers, in delivering the opinion of the Court, said: — "It is to be regretted, that this is not the rule, but it seems to be contrary to the current of authority, as has been clearly shown by the cases cited at the bar. The rule is, when a loss has been proved, or when goods are injured, the law will not intend negligence. The bailee is presumed to have acted according to his trust, until the contrary is shown. But to throw the proofs of negligence on the bailors, it is necessary to show, by clear and satisfactory proof, that the goods were lost, and the manner they were lost. All the bailor has to do in the first instance, is to prove the contract and the delivery of the goods, and this throws the burden of proof, that they were lost, and the manner they were lost, on the bailee, of which we have a right to

to the breaking down and overturning of a stage-coach, it seems that either of those events is *primâ facie* evidence of negligence on the part of the proprietor and his servants.[1]

§ 62. By the Civil Law, as has already been shown,[2] the settled doctrine is, that in all cases of theft, the burden of proof is thrown upon the bailee to repel the presumption of negligence. And by the French Law, where a loss or injury happens to a thing deposited for hire, the burden of proof is in like manner thrown upon the hirer, to repel the presumption.[3] By the Scottish Law, if any specific injury has occurred not manifestly accidental, the *onus probandi* lies on the bailee to justify himself by proving the accident.[4]

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require very plain proofs." See also, to the same effect, Beekman *v.* Shouse, 5 Rawle (Penn.) R. 179. In Schmidt *v.* Blood, 9 Wend. (N. Y.) R. 268, the Court held, that a warehouseman, not chargeable with negligence, is not responsible for goods intrusted to him if stolen or embezzled by his storekeeper or servant, and the *onus* of showing negligence lies on the owner. The Supreme Court of Tennessee hold, that, "in a bailment for hire the *onus probandi* of negligence is upon the bailor; and that, after the bailor has proved the contract and delivery of the goods, the burden of proof is upon the bailee to show their loss, and the manner they were lost, and this throws the proof of negligence upon the bailor." Rungan *v.* Caldwell, 7 Humph. (Tenn.) R. 134. The above case of Platt *v.* Hibbard, 7 Cowen, R. 497, was commented on and disapproved by the Court in Foote *v.* Storrs, 2 Barb. (N. Y.) R. 326, in which it was held, that in all cases where a defendant is bound only to ordinary care, and is liable only for ordinary neglect, the plaintiff cannot reason upon the mere proof of the loss of the articles entrusted to the bailee; and that the *onus* is on the plaintiff to give some evidence of a want of care in the bailee or his servant. As to the *onus probandi*, in cases of carriers without hire, see *ante*, § 38.

[1] Christie *v.* Griggs, 2 Campb. R. 79; Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181.

[2] *Ante*, § 48.

[3] Poth. Contrat de Louage, n. 194, 199, 200; Code Civil of France, art. 1732 *et seq.*, cited in Story on Bailm. § 454; and as to Civil Law authorities, see Story on Bailm. § 278, 339, 411.

[4] 1 Bell, Comm. 454, (5th edit.)

§ 63. The Common Law does not probably differ from the Civil Law as to the *onus probandi*, after a due demand of the property and refusal. The demand and refusal would be evidence, as has been seen, of a tortious conversion, so that it would then be incumbent on the bailee to give evidence of a loss by casualty or superior force, and independent of his own statement.[1] It has been said, in respect to depositaries not for hire, that the distinction would seem to be, that when there is a total default to deliver the goods bailed, on demand, the *onus* for accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie.[2] It may, therefore, be different where a *primâ facie* case of trover is made out, from what it would be, in an action of assumpsit, or an action on the case founded on negligence.[3] In many complicated cases of evidence, the burden of proof may alternately shift from one party to the other, in different stages of the trial.[4]

§ 64. In an action against a bailee for negligence, it appears, that his conduct and his statements contemporaneous with the loss, are admissible evidence in his favor, to estab-

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[1] *Ante*, § 38; Story on Bailm. § 339. A demand and refusal is ordinarily evidence of a conversion; unless the circumstances constitute a just excuse. Phillpott *v.* Kelley, 3 Adol. & Ell. R. 106; Cranch *v.* White, 1 Bing. N. Cas. 414.

[2] See note to the case of Platt *v.* Hibbard, 7 Cow. (N. Y.) R. 500. Proof of the loss of goods by a carrier will not be sufficient to maintain a count in trover. But a demand and non-delivery are evidence of a conversion, and are sufficient, unless the carrier can give some legal excuse. Ross *v.* Johnson, 5 Burr. R. 2825; 2 Salk. R. 655. A judgment in an action of assumpsit, against a bailee, for a breach of his contract to transport and deliver the propetry bailed, in which the owner has recovered damages for the value of the property, without satisfaction, is no bar to an action of trover against a third person, who has purchased the property of the bailee. Hyde *v.* Noble, 13 N. Hamp. R. 494.

[3] *Ante*, § 38.

[4] Story on Bailm. § 278.

lish the nature of the loss, or how it occurred; but the jury are to decide in reference to all the circumstances, and are at liberty either to believe or disbelieve the bailee's statement, or own account.[1]

§ 65. In a suit against a carrier for goods lost, the promise of the carrier, after the commencement of the suit, to pay for the goods, if the plaintiff would swear to a list of them, was held an admission of the carrier's liability; and an affidavit of the plaintiff, made in pursuance of such promise, is admissible in evidence to the amount of his demand.[2]

§ 66. Upon general principles it would seem, that warehousemen, wharfingers, and private carriers for hire, ought to have a *specific lien* on the thing for their labor and services, like artisans; but it is a matter upon which, it is said, the authorities present no rules for a guide.[3] Warehousemen and wharfingers have sometimes in England a *lien* by custom;[4] and it has been held in Pennsylvania, that warehouse-

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[1] Doorman *v.* Jenkins, 2 Adol. & Ell. R. 256; Tompkins *v.* Saltmarsh, 14 S. & Rawle (Penn.) R. 275; and see *ante* § 40.

[2] Hurd *v.* Pendrigh, 2 Hill (N. Y.) R. 502; and see Brooks *v.* Ball, 18 Johns. (N. Y.) R. 337.

[3] Story on Bailm. § 453 *a*, (edit. of 1846.) In respect to a specific *lien*, it has been laid down as a general rule, that where a bailee spends labor and skill *in the improvement* of the chattel bailed, he has a *lien* on it. Bevan *v.* Waters, 1 Mood. & Malk. R. 235. But it has been added, that his *lien* is confined to cases where additional value has been conferred by him on the chattel, either directly, by the exercise of personal labor or skill, or indirectly, by the intervention of any instrument over which he has control. Scarfe *v.* Morgan, 4 M. & Welsb. R. 270; Jackson *v.* Cummings, 5 Ib. 342. Upon this latter ground, it has been held in England, that an agister of cattle has no lien on the cattle for the pasturage consumed. This doctrine (Story on Bailm. *ub. sup.*) has as yet not been recognized in this country; and certainly it is not without its difficulties. In its application to livery stable keepers, it may be admitted, because there would seem to be an implied contract to deliver the animal at the mere pleasure of the owner.

[4] Rex *v.* Humphrey, 1 M'Clel. & Young, R. 194; Lockhart *v.* Cooper,

men have a specific *lien*, although it cannot be said, that by care and skill, they have, like artisans, improved the thing bailed.[1] Chief Justice Gibson, who delivered the opinion of the Court in this case, held, that, on the ground of principle, it was not easy to discover why the warehouseman should not have the same *lien* for the price of future delivery as that of a carrier (*common* carrier) has. The one delivers at a different time, the other at a different place; the one after custody in a warehouse, the other in a vehicle; and that was all the difference. It was true, that the measure of a common carrier's responsibility was greater; but that, though a consideration to influence the quantum of his compensation, was not a consideration to increase the number of his securities for it. The learned Judge, in short, understood the law to be, that a warehouseman (and a private carrier stands on the same footing) stands on a footing with a common carrier, whom in this country he closely resembles. Now, common carriers, in virtue of the obligation they are under, by the "custom of the realm" to carry for a reasonable

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1 Scott, R. 481. Where no *lien* exists at Common Law, it can only arise by contract with the particular party, either express or implied; it may be implied either from previous dealings between the same parties upon the footing of such a *lien*, or from a well and long established usage of trade so general, as that the jury must reasonably presume, that the parties knew of, and adopted it, in their dealing. Rushforth *v.* Hadfield, 7 East, R. 224. There is a well known distinction between a commercial *lien*, which is the creature of usage, and a Common Law *lien*, which is the creature of policy. The first gives a right to retain for a balance of accounts; the second, for services performed in relation to the particular property. Commercial or general *liens*, which have not been fastened upon the law merchant by inveterate usage, are discountenanced by the Courts as encroachments on the Common Law. Per Gibson, C. J., in delivering the opinion of the Court in Steinman *v.* Wilkins, 7 Watts & S. (Penn.) R. 466. And see, as to the general principles of the law of lien, Chase *v.* Wetmore, 5 M. & Sel. R. 180; Jacobs *v.* Latour, 5 Bing. R. 132; Kirkham *v.* Shawcross, 6 T. R. 17; Bevan *v.* Waters, Mood. & Malk. R. 235; Jackson *v.* Cummings, 5 M. & Welsb. R. 342.

1 Steinman *v.* Wilkins, 7 Watts & S. (Penn.) R. 466.

reward, have a *lien* for the carriage price of the particular goods; for, as the law imposes that burden, it gives them the power of retaining for their indemnity.[1] But it is held, in Pennsylvania, that the Common Law rule, that common carriers are obliged to receive goods for carriage, at the current price, cannot properly be applied.[2]

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1 As will be shown in a subsequent chapter.

2 Gordon *v.* Hutchinson, 1 Watts & S. (Penn.) R. 285; and Steinman *v.* Wilkins, *ub. sup.* For a more full consideration of the doctrine of lien as applied to carriers, see *post* §

CHAPTER IV.

WHO ARE COMMON CARRIERS.

§ 67. Common carriers are the second description of persons who have been mentioned [1] as carrying *for hire*, and whose contract, in that capacity, belongs to the class of bailments denominated *Locatio operis*, and is styled *Locatio operis mercium vehendarum*.[2] The trust created by this contract, being both for the benefit of the bailor and the bailee, the latter, if only a private carrier, is bound only to ordinary diligence, as appears by the preceding chapter. But a *common* carrier differs from a private carrier in *two* important respects; 1. In respect of *duty*, he being obliged, by law, to undertake the charge of transportation, which no other person, without a special agreement, is. It is not even necessary to charge him as carrier, that a specific sum should be agreed upon for carriage, although he is entitled to reasonable compensation. 2. In respect of *risk*. A common carrier is regarded by the law as an *insurer* of the property intrusted to him; or, in other words, he is legally responsible for acts against which he could not provide, from whatever cause arising, the acts of God and the public enemy only excepted. The loss of, or damage done to, property in his possession to be carried, is of itself sufficient proof of negligence, the maxim being, that every thing is negligence which the law does not excuse; so that in all cases, but those just mentioned as excepted, his faultlessness is no discharge.[3] This peculiar duty and this extraordinary responsibility, imposed by the force of the general law, upon a common

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[1] *Ante*, § 1.

[2] See the different divisions and subdivisions of bailments, *ante*, § 13, 14, 15.

[3] See Coggs *v.* Bernard, Appx.

carrier, are to be extensively considered in subsequent chapters; but it is important to inquire beforehand when persons become common carriers, inasmuch as it would be unjust to impose upon an individual the duty and the responsibility just mentioned, until he has so conducted himself, and so held himself out, as to have fairly assumed them.[1] Therefore, it is proposed, in the present chapter, to consider, *first*, who are common carriers, and *secondly*, whether the duties and obligations which persons have incurred by voluntarily becoming such, extend alike to every description of *thing*.

§ 68. First; The general law of bailments, as has before been mentioned,[2] was so unsettled from the reign of Elizabeth to the reign of Anne, as to have been in that interval the subject of surprising diversity of opinion and inconsistency of argument. But the rule of the above-mentioned extraordinary responsibility of a *common* carrier seems to have been first established in the commercial reign of the former, upon the principles of policy and convenience, or to favor and encourage commerce by guarding against the carrier's collusion and combination with thieves and robbers.[3] Lord Chief Justice Holt, in the case of Coggs *v.* Bernard,[4] which was decided in the second year of the reign of Anne, in enumerating and expounding the different sorts of bailments, mentions the one of the carriage of goods for hire as "a delivery to carry for a reward to be paid to the bailee," which, he says, "is either a delivery to one that exercises a *public employment*, or a delivery to a private person." Therefore, according to Lord Holt, to bring a person within the description of a common carrier, he must exercise the business of carrying as a "public employment," or, as it has been said, "he must undertake to carry goods for persons

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[1] As is said by the Court in Boyce *v.* Anderson, 2 Peters (U. S.) R. 150.

[2] *Ante*, § 3.

[3] Jones on Bailm. 103; Story on Bailm. § 489, 490.

[4] Coggs *v.* Bernard, Appx.

generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation *pro hac vice*." [1]

§ 69. It was determined in the eighth year of the reign of Anne, that any person undertaking, for hire, to carry the goods of *all persons indifferently*, is, as to the liability imposed, to be considered a common carrier. The case was trover for goods which had been put, with the carrier's wagon, into a barn, and taken as a distress. The person to whom the goods had been intrusted carried cheese to London, and usually loaded back with goods for a reasonable price for all persons indifferently; and the Court held, that "such an undertaking to carry for hire, as this privilege, was to be considered that of a common carrier, and the goods so delivered for that time under legal protection, and privileged from distress; and so wherever they are delivered to a person exercising any public trade or employment." [2] So of *inn*

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[1] Story on Bailm. § 495; Citizens' Bank *v.* Nantucket Steamboat Company, 2 Story (Cir. Co.) R. 32. In North Carolina, to render a person liable as common carrier, he must make the carriage of goods his *constant* employment, and one employed *pro hac vice*, though for hire, is not liable as a common carrier. Anonymous *v.* Jackson, 1 Hayw. (N. C.) R. 14.

[2] Gisbourne *v.* Hurst, 1 Salk. R. 249. Evidence that the defendant kept a booking office for a considerable number of coaches and wagons, is not of itself sufficient to prove him a common carrier. Thus where, it was proved, that at the door of a booking office there was a board on which was painted "conveyances to all parts of the world," and list of names of places; was held not sufficient proof that the owner of the office was a common carrier, so as to charge him for the loss of a box which was booked there. Upston *v.* Slark, 2 C. & Payne, R. 598; Gilbert *v.* Dale, 1 Nev. & Per. R. 22. A promise by a book-keeper to make compensation for the loss of a parcel, is not binding upon the master, unless he be proved to be a general agent of the master for such purposes. Olive *v.* Eames, 2 Stark. R. 181. As will be more fully illustrated, (*post*, § 75,) the difference between a common carrier and a warehouseman, in respect to liability, is the same as between a common carrier and a private carrier. Sometimes a person is both a common carrier and warehouseman, and when the goods are safely deposited in his warehouse, his liability

keepers. A person who only occasionally entertains travellers for pay, is not an *inn keeper* within the meaning of the law, and if property is intrusted to his care, by his guests, and it is lost, he is not responsible as a *common* inn keeper. Most of the farmers in the new States and Territories in the West occasionally entertain travellers, without supposing themselves liable as common inn keepers for the horses or other property of their guests, which may be stolen, without any fault of their own. And it is held, in those parts of the United States, that to be subject to the same responsibility attaching to inn keepers, a person must make tavern keeping, to some extent, a *regular business* and so *hold himself out to the world.*[1]

§ 70. In Dwight *v.* Brewster, in Massachusetts,[2] Parker, C. J., in delivering the opinion of the Court, defined a common carrier to be "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place," and this, he added, "might be carried on at the same time with other business." But in this country there is a discrepancy in the authorities, as to the undertaking necessary to impose upon persons the responsibility of common carriers. Indeed, in this country it is considered reasonable, and to be well settled, that a person who undertakes, though it be only

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as common carrier ceases, and he is only liable for ordinary negligence, as a private bailee for hire. In a late case, it appeared that four rolls of leather, the property of the plaintiff, were delivered to the defendants, (Boston and Providence Railroad Corporation,) at Providence, to be transported to Boston, one of which rolls of leather, on their being inquired for by the teamster of the plaintiff at the depot in Boston, was missing. It was the usage and practice of the defendants, to deposit the goods they transported, until the owner should have a reasonable time to remove them, and therefore the Court held, that the defendants were not liable as common carriers, for the loss of the roll of leather from the warehouse; but liable only as depositaries, or for want of ordinary care. Thomas *v.* Boston and Providence Railroad Corp. 10 Met. (Mass.) R. 472.

[1] Lyon *v.* Smith, (in Error,) 1 Morris, (Iowa) R. 184.

[2] Dwight *v.* Brewster, 1 Pick. (Mass.) R. 50.

pro hac vice, to act as a common carrier, that is, to carry for hire without a special contract, *thereby* incurs the responsibility of a common carrier.[1] Both in Pennsylvania,[2] and in Indiana,[3] it has been held, that a wagoner, who, upon his request, carries goods for hire, is a common carrier, whether the transportation be his principal and direct business, or an occasional and incidental employment; and the principal business of the carrier in both of the cases referred to, was that of a farmer. In the case in Pennsylvania, C. J. Gibson, in giving the opinion of the Court, said: — "The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He *applied* for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him. There was nothing special in the case; on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but independent of that, we are of opinion that he is liable as an *insurer*." The above case of Gisbourne *v.* Hurst is thus commented on by the learned Judge: — "The best definition of a common carrier, *in its application to the business of this country*, is that given by Jeremy,[4] which he has taken from Gisbourne *v.* Hurst, which was the case of one who was thought to be a common carrier only because he had for some small time before brought cheese to London, and took such goods as he could carry back into the country at a reasonable price. Mr. J. Story has cited this case, to prove, that a common carrier is one who holds himself out

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[1] See Mr. Wallace's learned note to the case of Coggs *v.* Bernard, 1 Smith, Lead. Cas. (Am. ed. 1847,) p. 230; Moses *v.* Norris, 4 New Hamp. R. 304.

[2] Gordon *v.* Hutchinson, 1 Watts & S. (Penn.) R. 285.

[3] Powers *v.* Davenport, 7 Black. (Ind.) R. 497.

[4] Jeremy on Carr. 4.

as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*.[1] The conclusion of C. J. Gibson was very different. He took it, that a wagoner, who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It was true, that the Court (in Gisbourne *v.* Hurst) went no further than to say, that a wagoner, was a common carrier, as to the privilege of exemption from distress; but his contract was held not to be a private undertaking, as the Court was at first inclined to consider it, but a public engagement, by reason of his readiness to carry for any one who would employ him, without regard to his other avocations, and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier; indeed they are correlative, and there is no reason why he should not enjoy the one, without being burdened with the other." In Pennsylvania, said C. J. Gibson, the wagoner was not always such by profession. No inconsiderable part of the transportation was done by the farmers in the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns; and many of them passed by their homes, with loads to Pittsburg or Wheeling, the principal towns of embarkation on the Ohio. But no one supposed they were not responsible as common carriers.[2]

§ 71. The rule approved and laid down in Tennessee, is, that one who undertakes for reward to convey produce from one place upon the river to another, becomes thereby liable as a common carrier.[3] The same seems to be the doctrine in South Carolina.[4] Where a person, in that State, em-

1 Story on Bailm. § 495; and see the case stated, *ante*, § 69.

2 Gordon *v.* Hutchinson, *ub. sup.*

3 Turney *v.* Wilson, 7 Yerg. (Tenn.) R. 340; Craig *v.* Childress, Peck, (Tenn.) R. 270.

4 M'Clure *v.* Hammond, 1 Bay (S. C.) R. 99.

ployed a boat to take his own cotton, and occasionally carried that of his neighbors, it was held, that he was bound as a common carrier by the consent of his captain to taek freight, though application for that purpose was usually made to himself. But, if the defendant had previously employed his boat for his own purposes *exclusively*, it could not be fairly inferred, that the agent could do what his employer never had done; but his employer had in some measure used the boat for the community in which he lived, and from his course of dealing with it, had held himself out as a common carrier.[1] In a very late case in Georgia,[2] there is an elaborate opinion of the Supreme Court of Georgia, in which the Court directly declare, that the rule as laid down in Gordon *v.* Hutchinson, in Pennsylvania, is opposed to the principles of the Common Law, and that it is wholly inexpedient. The decision in this case was, that a person who received and contracted to deliver certain packages of goods in good order and condition, unavoidable accidents only excepted, was not a common carrier, because it did not appear, that carrying was his *habitual* business.[2]

§ 72. But, although a person may incur the liability of a common carrier, by receiving goods on his *own application* to carry them for hire from one place to another, as an occasional business, yet if a person is induced so to undertake by the *particular request of his employer*, he incurs only the liability of a private carrier; and this, even when the person has once been a public carrier, and since abandoned the occupation. In Satterlee *v.* Grant,[3] the defendant had been a public common carrier between Schenectady and Albany, previous to 1819, and in that year sold out all his teams but one, which he kept for *agricultural purposes* on his farm. Although it appeared in evidence, that he employed his team in the carrying and forwarding business,

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[1] M'Clure *v.* Richardson, 1 Rice (S. C.) R. 215.
[2] Fish, &c. *v.* Ross, 2 KeH. (Geo.) R. 349.
[3] Satterlee *v.* Grant, 1 Wend. (N. Y.) R. 272.

until 1822 or 1823, yet it did not so appear, that subsequently, he carried and forwarded a single load, until April, 1824, when, upon an urgent application of one J. D., he dispatched a driver with his team, to bring some loads from Albany to Schenectady, with instructions to the driver, to bring nothing for any other person; and if the goods of J. D. were not ready, to come back empty. He brought two loads, and returned for a third, under the same instructions; but the third not being ready, instead of returning empty, he applied to the plaintiff for a load, which was delivered to him to be carried to Frankfort, in Herkimer county. Arriving at Schenectady late at night, it was discovered the next morning, that one of the boxes had been broken open, and a part of the goods stolen. The defendant had disavowed all responsibility, before it was discovered, that any of the goods had been taken, and had declared, that the driver had violated his express instructions in receiving them for carriage. The driver was subsequently convicted of stealing them and sent to the State prison therefor. The defendant gave immediate notice to the plaintiff of all the facts, and disavowed his responsibility for the loss. The Court held, that the defendant stood upon the same footing, as though he had never been engaged in the forwarding business, and that he was not responsible for the act of his servant done in the violation of his instructions, and not in the ordinary course of the business in which he was employed. The Court put the case of a farmer's sending a servant with a load of wheat to market, and he, without any instructions from his master, applies to a merchant for a return load, and absconds with it, and then asks, if the master could be responsible? Most clearly, they say, he would not be; for the reason, that it was beyond the scope of the general authority of the servant, *quoad hoc*. He acted for himself and on his own responsibility, and not for his employer.

§ 73. The case of Jenkins *v.* Pickett, in Tennessee,[1] was

[1] Jenkins *v.* Pickett, 9 Yerg, (Tenn.) R. 480.

not unlike the above. In this case a common carrier sent his wagon to N. with a load of cotton, the driver of which was a young negro, who had never been allowed to make contracts for hauling, and who had never been trusted before alone, with the wagon and team, and who at this time was particularly instructed to bring home a load of salt, and not to receive goods for carriage; notwithstanding which, he did receive goods for carriage, and the goods were damaged; it was held, that the carrier was not liable.

§ 74. There is not an entire coincidence in opinion, it has been said,[1] as to whether carmen, truckmen, and other porters, who undertake to carry goods for hire *from one part of a town or city to another*, as a common employment, are common carriers. It seems to have been held in England, at *Nisi Prius*, by Lord Abinger, in Brind *v.* Dale, that a town carman, whose carts ply for hire near the wharves, and who also lets the same out by the hour or day, or job, is not a common carrier.[2] Story, in referring to this case, seems to be at a loss to perceive what substantial difference there is in the case of parties who ply for hire, for the carriage of goods of all parties indifferently, whether the goods are carried from one town to another, or from one place to another within the same town; and that there is any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out, as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town, or in different towns.[3] Both this learned author and Kent lay it down, upon the strength of the general authorities, that truckmen, teamsters, and cartmen, who undertake to carry goods, as a common employment, from one part of a town or city to another, are subject to the liabilities

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[1] Story on Bailm. note to § 496, (edit. 1846.)
[2] Brind *v.* Dale, 8 C. & Payne, R. 207.
[3] Story on Bailm. *ub. sup.*

and duties of common carriers.[1] In Brind *v.* Dale it appears, that the goods were put into the cart under a modified contract, that the plaintiff should go with them, and take care of them; and Lord Abinger in summing up, told the jury, that if they thought that the goods were delivered under such modified contract, their verdict on that issue should be for the defendant; and the jury so found. In the case of Robertson *v.* Kennedy, in the Court of appeals of Kentucky, in 1834,[2] it was decided expressly, that the defendant was liable, as a common carrier, for the loss of a hogshead of sugar, which he had undertaken to convey from the bank of the river in the town to the store of the plaintiff in the same town, and, in giving their opinion, the Court said, that "draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition; so also does the driver of a slide (sled,) with an ox team; the mode of transportation is immaterial." In a case where common carriers, from Gainsborough to Manchester, charged and received for the cartage of goods to the consignee's house at Manchester, from a warehouse there, where they usually unloaded, Lord Kenyon said: — "In this case there is one peculiar circumstance, which makes it necessary to decide the general question, and that is, the charge made by the defendants in one of their bills *for the cartage at Manchester;* for *that* charge the defendants were obliged to deliver the goods;" and the defendants were held liable as common carriers from the warehouse in Manchester to the house of the consignee there.[3]

§ 75. There is a class of persons well known in this country, who are called "*forwarding merchants*," and who usually combine in their business the double character of

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[1] Story on Bailm. § 496; 2 Kent, Comm. 598, 599.

[2] Robertson & Co. *v.* Kennedy, 2 Dana (Ken.) R. 430.

[3] Hyde *v.* Trent and Mersey Nav. Co. 5 T. R. 389.

warehousemen and agents for a compensation, to forward goods to their destination. This class of persons is especially employed upon our canals and railroads, and in our coasting navigation by steam-vessels and other packets.[1] The law is, that persons so employed, if they have no concern in the vehicle by which the goods are sent, and have no interest in the freight, are not liable as common carriers, but are of course liable, like warehousemen and common agents, that is, for ordinary diligence, and for that only.[2] They are responsible only for want of good faith, and reasonable and ordinary diligence ; but one of their first duties, as consignees for transmission, undoubtedly, is to obey the instructions of the consignor, either express, or fairly implied ; and when they undertake to vary from the instructions, from whatever motive, and a loss is thereby occasioned, they are clearly liable to the owners of the goods.[3] Sometimes a person is both a common carrier and a forwarding merchant, and receives goods into his warehouse to be forwarded in obedience to the future orders of the owner ; and if, in such case, the goods are lost by fire before such orders are received, or the goods sent forward, he is not chargeable as common carrier, but only as warehouseman. His duty as carrier ends also, when the goods have arrived at the place of their fixed destination, and are deposited in the carrier's warehouse, when his duty as warehouseman again commences.[4] But if the deposit in the warehouse of the carrier be at some intermediate place in the course of his route ; or if, after the arrival at the place of destination, he is still under obligation to

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[1] 2 Kent, Comm. 591, 592 ; Story on Bailm. § 444.

[2] Platt *v.* Hibbard, 7 Cow. (N. Y.) R. 497 ; Streeter *v.* Horlock, 7 Bing. R. 34 ; Brown *v.* Denison, 2 Wend. (N. Y.) R. 593 ; Hyde *v.* Trent Nav. Co. 5 T. R. 389 ; Story on Bailm. § 444 ; Ackley *v.* Kellogg, 8 Cow. (N. Y.) R. 223.

[3] Forsyth *v.* Walker, 9 Burr, (Penn.) R. 148.

[4] Story on Bailm. § 449 ; Platt *v.* Hibbard, *ub. sup.* ; Roskell *v.* Waterhouse, 2 Stark. R. 461 ; Roberts *v.* Turner, 12 Johns. (N. Y.) R. 232 ; Webb, *in re*, 8 Taunt. R. 343.

deliver the goods to the owner; and before such delivery he has put them into his own warehouse, where they are consumed by fire, he will be liable for the loss, his duty, as carrier, not being ended.[1]

§ 76. That *wagoners* and *teamsters*, who, as a public and common employment, for hire, transport goods and merchandise from *one town to another*, are responsible as common carriers, has never been questioned.[2] This mode of transportation has for a long period been extensively followed in Pennsylvania, and in that State it has ever been considered, that the persons thus engaged in transportation, are common carriers.[3] It is, however, clear, that if people be unwary enough to send parcels by the driver of a wagon for a hire paid to him, which is never to find its way into the pocket of the owner of the wagon, the owner is not liable in case the parcel is lost.[4] If money should be intrusted to a common wagoner, not authorized to receive it, by the ordinary business of his employers and owners, at their risk, they cannot be considered as liable for the loss thereof as common carriers, any more, it has been affirmed, than they would be for an injury done by his negligence to a passenger, whom he had casually taken up on the road.[5]

§ 77. Next, as to *coach-masters*, or *proprietors of stage-*

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[1] Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent Navigation Co. 5 T. R. 389; and see Thomas *v.* Boston and Prov. Railroad Corp. 10 Met. (Mass.) R. 472, and *ante*, § 69, n. 2.

[2] 2 Kent, Comm. 598, 599; Story on Bailm. § 496; Gisbourne *v.* Hurst, *ante*, § 70; Hyde *v.* Trent and Mersey Nav. Co. *ub. sup.*; Campbell *v.* Morse, Harp. (S. C.) R. 468; McHenry *v.* Railroad Co. 4 Harring. (Del.) R. 448; Powers *v.* Davenport, *ante*, § 70.

[3] Locky *v.* M'Dermott, 8 S. & Rawle (Penn.) R. 500; Gordon *v.* Hutchinson, *ante*, § 70.

[4] Per Garrow, J., in summing up to the jury, in Butler *v.* Basing, 2 C. & Payne, R. 14.

[5] Per Story, J., in Citizens' Bank *v.* Nantucket Steamboat Company, Story (Cir. Co.) R. 32.

coaches, as common carriers. Persons who come within this description, are liable as common carriers for the carriage of goods, provided they usually carry them for hire, and so hold themselves out to carry for all persons indifferently.[1] In Dwight *v.* Brewster, it was expressly held, that an established practice of conveying for hire in a stage-coach, parcels not belonging to passengers, renders the proprietors liable as common carriers; for, although the principal business is to carry passengers, there is no reason why the proprietors should not be common carriers of merchandise.[2] But the proprietors are not *of course* responsible as common carriers; they are so only when they have been in the practice of receiving and carrying for hire parcels or packages for persons not passengers in their coaches.[3] The authorities generally leave no doubt, that where a proprietor of a coach holds himself out to the public as only engaging for the personal conveyance of passengers: and refuses to allow his coach to be a conveyance for goods in general, the Courts would consider him not a common carrier. If it has been the practice of a *driver* of one of their coaches to carry articles for hire for *his own* particular advantage, that fact alone will not render them liable.[4] But if, on the other hand, the driver is to be paid a certain sum of money per month, and the compensation which shall be paid for carrying small packages, that will render the proprietors liable in case of loss; unless the owner of the packages knows the arrangement, and con-

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[1] Jeremy on Carr. 11; Middleton *v.* Fowler *et al.* 1 Salk. R. 282; Story on Bailm. § 500; 2 Bac. Abr. *Carriers;* Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327; and 6 Ib. 335; Bean *v.* Sturtevant, 8 N. Hamp. R. 325; Jones *v.* Voorhees, 10 Ohio R. 145; Merwin *v.* Butler, 17 Conn. R. 138.

[2] Dwight *et al. v.* Brewster *et al.* 1 Pick. (Mass.) R. 50; McHenry *v.* Railroad Co. 4 Harring. (Del.) R. 448.

[3] Beekman *v.* Shouse, 5 Rawle (Penn.) R. 179.

[4] Bean *v.* Sturtevant, 8 N. Hamp. R. 325; Butler *v.* Basing, 2 C. & Payne, R. 614; Blanchard *v.* Isaacs, 3 Barb. (N. Y.) R. 388; and *ante*, § 76.

tracts with the driver solely on his own responsibility.[1] The driver *himself* of a stage-coach generally employed by the proprietors, and who has been in the habit of carrying parcels of money for a small compensation, which was uniform, whatever might be the amount contained in any one package, is not subject, it has been held, to the responsibility of a common carrier, but only to that of *ordinary negligence*, or, in other words, to the responsibility only of a *private* carrier.[2]

§ 78. On the same principle that wagoners and the proprietors of stage-coaches are liable as common carriers, when they are accustomed to carry goods for all persons indifferently, the proprietors of *railroad cars*, which run between different places, and which are used for the purpose of so carrying, are liable in like manner, and the like reasoning applies.[3] In the case of Thomas *v.* Boston and Providence Railroad Corporation, Hubbard, J., in delivering the opinion of the Court, observed in relation to the importance of railroad companies as common carriers, as follows: "The introduction of railroads into the State has been followed by their construction over the great lines of travel of passengers and transportation of merchandise; and the proprietors of these novel and important modes of travel and transportation, which have received so much public favor, have become the carriers of great amounts of merchandise. They advertise for freight; they make known the terms of the carriage; they provide suitable vehicles, and select convenient places for receiving and delivering goods; and, as a legal conse-

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[1] Bean, &c., *ub. sup.*

[2] Shelden *v.* Robinson, 7 N. Hamp. R. 157; and see *ante*, Chap. III.

[3] Parker *v.* Great Western Railway, 7 Man. & Grang. R. 253; Muschamp *v.* Lancaster Railway Co. 8 M. & Welsb. R. 421; Palmer *v.* Grand Junction Railway Co. 4 M. & Welsb. R. 749; Pickford *v.* Grand Junction Railway Co. 12 M. & Welsb. R. 766; Eagle *v.* White, 6 Whart. (Penn.) R. 505; Weed *v.* S. and S. Railroad Co. 19 Wend. (N. Y.) R. 534; Camden and Amboy Railroad Co. *v.* Burke, 13 Ib. 60; Story on Bailm. § 500.

quence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the Common Law which are applicable to carriers." [1]

§ 79. Though no substantial difference, says Sir William Jones, in speaking of common carriers, is assignable between carriage by *land* and carriage by *water*, or in other words, between a *wagon* and a *barge*, yet it soon became necessary for the Courts to declare, as they did in the reign of James I. that a common *hoyman* is responsible for goods committed to his custody, even if he be robbed of them; and that, therefore, the law which had been advanced concerning a *land* carrier, may be applied to a *bargemaster* or *boatman*.[2] A later English writer, on the law of carriers, says that *hoymen* by the custom of the realm are bound to keep and deliver goods safely, for their hire is due by custom,[3] and that an action lies equally against a common bargeman, without any special agreement, as against a carrier upon land.[4] In the case of the proprietors of the Trent Navigation Company *v.* Wood, it was declared by Lord Mansfield, and the other Judges of the King's Bench, that there is no distinction between a land and a water carrier.[5]

§ 80. The rule as thus laid down in England, in respect

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[1] Thomas *v.* Boston and Providence Railroad Corp. 10 Met. (Mass.) R. 472.

[2] Jones on Bailm. 107. He cites Rich *v.* Kneeland, Cro. Jac. 330; Hob. R. 30; "the first case of this kind," said Lord Holt, "to be found in the books," 12 Mod. 410. It was a case against a common bargeman, for loss of property. Error was brought and assigned, that the action lay not against a common bargeman, without special promise; but all the justices and barons held, that case as well lies, as against a common carrier by land.

[3] Jeremy on Carr. 7; 1 Roll. Abr. C. 2, 15.

[4] Jeremy on Carr. 9.

[5] Proprietors of Trent Nav. Co. *v.* Wood, 3 Esp. R. 127, and 4 Doug. R. 287, cited in Jeremy on Carr. 52, 2 Kent, Comm. 600, Story on Bailm. § 489.

to carriers by *water*, has been recognized and settled in this country.[1] In New York, says Kent, the English Common Law on the subject of the general responsibility of common carriers, has been fully, explicitly, and repeatedly recognized in its full extent; and equally in respect to carriers by *land* and carriers by *water*.[2] It was understood and declared in Elliott *v.* Rossell, upon a full consideration of the subject, that a water carrier warranted the safe delivery of goods, in all cases but the excepted cases of the act of God and public enemies.[3] The case of Aymar *v.* Astor,[4] it is true, would seem to unsettle the Common Law rule as to carriers by water; but, if there was not some mistake in the report of that case, it was completely overruled by the case of Allen *v.* Sewall.[5] Although this last case was reversed by the Court of Errors, it was upon a different ground, and the general doctrine as to the liability of common carriers by water, was not disturbed;[6] and were it so, it would be against prior and subsequent decisions in the same State. In Pennsylvania, although the English law, as to the liability of common car-

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1 Story on Bailm. § 508.

2 2 Kent. Comm. 608.

3 Elliott *v.* Rossell, 10 Johns. (N. Y.) R. 1. So also held in Colt *v.* M'Mechen, 6 Ib. 160; Schiefflin *v.* Harvey, Ib. 170; Kemp *v.* Coughtry, 11 Ib. 107; Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327; M'Arthur *v.* Sears, 21 Ib. 190. That the rule has been recognized in other States; see Williams *v.* Grant, 1 Conn. R. 487; Clarke *v.* Richards, Ib. 54; Richards *v.* Gilbert, 5 Day (Conn.) R. 415; Bell *v.* Reed, 4 Binn. (Penn.) R. 127; Hastings *v.* Pepper, 11 Pick. (Mass.) R. 41; Dwight *v.* Brewster, 1 Ib. 50; M'Clure *v.* Hammond, 1 Bay (S. C.) R. 99; Miles *v.* Johnson, 1 M'Cord (S. C.) R. 157; Cohen *v.* Hume, Ib. 439; Murphy *v.* Stanton, 3 Munf. (Va.) R. 239; Moses *v.* Norris, 4 N. Hamp. R. 304; Craig *v.* Childress, Peck (Tenn.) R. 270; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) R. 71; Turney *v.* Wilson, 7 Ib. 340; Faulkner *v.* Wright, 1 Rice (S. C.) R. 107; Williams *v.* Branson, 1 Mur. (N. C.) R. 417; Jones *v.* Pitcher, 3 Stew. & Port. (Ala.) R. 135.

4 Aymar *v.* Astor, 6 Cowen (N. Y.) R. 266.

5 Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327.

6 6 Wend. (N. Y.) R. 335.

riers by land, is admitted, yet in Gordon *v.* Little,[1] the law was considered with respect to carriers by inland navigation, to be unsettled so far as it regarded its application in that State. The carrier on inland waters, it was held in that case, would be clearly liable for ordinary negligence; but beyond that point, it was competent for the common carrier to prove a *usage* different from the Common Law. It was, however, adjudged in Harrington *v.* M'Shane,[2] that under the usage of trade on the *western* waters (the river Ohio) the owners of steamboats, carrying goods on freight, were common carriers, and liable as such for all losses, except those occasioned by the act of God, or the public enemy. Indeed, there is no doubt, that the doctrine of the English Common Law, which declares, that persons carrying goods for hire, by water, are common carriers, and that they are liable for all losses happening otherwise than from the causes just mentioned, prevails generally in this country, as a part of the Common Law of the land.[3] The reasons which originated the responsibility of common carriers, the Supreme Court of Connecticut consider, apply with peculiar force, as it respects carriers by water; upon which element a spirit of dangerous adventure has grown up, which disregards the safety, not of property merely, but of human lives.[4] No custom among the freighters and owners of boats on a navigable river, it has been held in North Carolina, will excuse them from the operation of the law governing common carriers.[5]

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[1] Gordon *v.* Little, 8 S. & Rawle (Penn.) R. 533.

[2] Harrington *v.* M'Shane, 2 Watts (Penn.) R. 443.

[3] So considered by Kent, 2 Kent, Comm. 609; and by Story on Bailm. § 497.

[4] Crosby *v.* Fitch, 12 Conn. R. 419.

[5] Adam *v.* Hay, 3 Mur. (N. C.) R. 149; Spivy *v.* Farmer's Adm'r. 1 Ib. 539. The owners of all river craft in Canada are responsible for losses occasioned by their own want of care or experience, and by that of their servants. Borne *v.* Perrault, Stuart (Lower Canada) R. 591, note.

§ 81. Therefore *canal boatmen*, like other boatment[1] carrying for the public, for hire, are common carriers, and responsible as such.[2] A captain of a canal boat navigating Lake Champlain, was held, in Vermont, to be liable as a common carrier.[3] It was held, that a boatman on the New York canals, employed in the transportation of property, inasmuch as he was a common carrier, had no right to sell any article sent by him to market, without express authority from the owner; and that, if an article so sent by the boatman be purchased from him, the owner may recover it from the purchaser.[4]

§ 82. So also are *ferrymen*, if they hold themselves out to the world as common carriers, which they usually do;[5] although whether the owners of a ferry are bound either by express contract, or by a contract implied from usage, to receive carriages with their contents on board, and land them at the end of the transit across the river, is a question for the jury to determine.[6] The owner of a private ferry may so use it (although on a road not opened by public authority, or

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[1] Harrington *v.* Lyles, 2 Nott & M'Cord (S. C.) R. 88; Williams *v.* Branson, 1 Murph. (N. C.) R. 417; Smyrl *v.* Niolan, 2 Bail. (S. C.) R. 421.

[2] Humphreys *v.* Reed, 6 Whart. (Penn.) R. 435; De Mott *v.* Larraway, 14 Wend. (N. Y.) R. 22; Parsons *v.* Hardy, Ib. 215; Bowman *v.* Teall, 23 Wend. (N. Y.) R. 306.

[3] Spencer *v.* Daggett, 3 Verm. R. 92.

[4] Arnold *v.* Halenbrake, 5 Wend. (N. Y.) R. 33.

[5] Story on Bailm. § 496; 2 Kent, Comm. 599; Smith *v.* Seward, 3 Barr (Penn.) R. 342; Pomeroy *v.* Donaldson, 5 Missou. R. 30; Cohen *v.* Hume, 1 M'Cord (S. C.) R. 444; 1 Nott & M'Cord (S. C.) R. 19; Gardner *v.* Greene, 8 Ala. R. 96; Rutherford *v.* M'Gowen, 1 Nott & M'Cord (S. C.) R. 17; Trent *v.* Cartersville Bridge Co. 11 Leigh (Va.) R. 521; Spivy *v.* Farmer's Adm'r. 1 Mur. (N. C.) R. 339.

[6] Walker *v.* Jackson, 10 M. & Welsb. R. 161. It was held in this case, that to rebut evidence of usage to take on board and land the *carriages* of passengers, a notice stuck up at the door of entrance of foot passengers, but not visible to those who came with carriages, nor shown to have been known to the plaintiff — that the defendant did not undertake

repaired by public labor,) as to subject himself to the liability of a common carrier; and he does do so, if he notoriously undertakes for hire, to convey across the river all persons indifferently, with their carriages and goods.[1] For articles not usually carried across the ferry, and to carry which is not within the ordinary employment of the owners of the ferry, the owners would not be liable for the loss of them; and more especially if the owners had no knowledge thereof, and the compensation was only for the personal emolument of the boatman.[2] But it by no means follows, that because the *State*, for the security of travellers, and as the price of the monopoly granted, exacts from the ferryman a *bond with surety*, and stipulates for the rates of ferriage, that the Common Law liability, which attaches to the carriage of goods for hire, does not arise; and the bond and surety are an additional security afforded by the State, because of the public nature of the ferryman's employment. Nor does the fact, that the State regulates the rate of toll, at all affect the question.[3] In England a number of statutes have been passed, regulating the prices of the carriage of goods by common carriers,[4] and it has never been supposed, that the passage of these acts varied their liability, as common carriers, which arises from the peculiar nature of their employment.

§ 83. The most common and the most important description of carriers by water at the present day, in this country, are the owners and masters of *steamboats*, which boats are, in almost all cases, engaged in the transportation of goods, as well as of persons, for hire, and are hence answerable for all goods generally shipped on board, unless for losses hap-

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to load or discharge horses or carriages, and would not be responsible for loss or damage done thereto — was not admissible.

[1] Littlejohn *v.* Jones, 2 M'Mul. (S. C.) R. 365.

[2] See opinion of Story, J., in Citizens Bank *v.* Nantucket Steamboat Co. 2 Story (Cir. Co.) R, 33; and *ante*, § 76, 77; and see *post*, § 84.

[3] Babcock *v.* Beene, 3 Ala. R. (N. S.) 392.

[4] As may be seen enumerated in 1 Bac. Abr. 557.

pening by the act of God or the public enemy.[1] So it has been considered in England,[2] and so expressly held in this country in the States of New York,[3] Pennslyvania,[4] Connecticut,[5] South Carolina,[6] Alabama,[7] Ohio,[8] Illinois,[9] and Tennessee.[10]

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[1] Story on Bailm. § 496; 2 Kent, Comm. 599; Jenckes *v.* Coleman, 2 Sumn. (Cir. Co. R. 221; Patton *v.* M'Grath, Dudley (S. C.) R. 159, a strong case of the responsibility of the owners of steamboats, as common carriers. It was held, by the Supreme Court of Florida, that where the declaration alleges, that the defendant followed the occupation of master or owner of a steamboat plying on a navigable river, this is a sufficient averment to fix the character which the Common Law attaches to masters and owners of ships, steamboats, &c., so as to charge the defendant with a breach of the duty which alone results from that character, without an express averment, that defendant was a "common carrier." Bennett *v.* Filyaw, 1 Florida R. 403.

[2] Siordet *v.* Hall, 4 Bing. R. 607; Gatliffe *v.* Bourne, 5 Scott, R. 667 and 4 Bing. N. Cas. 314; Muddle *v.* Stride, 9 C. & Payne, R. 380.

[3] Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327; Bank of Orange *v.* Brown, 3 Ib. 158; and that the owners of steamboats, railroads, &c., are held to be common carriers in New York, Hollister *v.* Nowlen, 19 Wend. (N. Y.) R. 234; Cole *v.* Goodwin, Ib. 251, and the cases therein referred to by Justices Bronson and Cowen; Powell *v.* Myers, 26 Wend. (N. Y.) R. 591; M'Arthur *v.* Sears, 21 Ib. 190.

[4] Harrington *v.* M'Shane, 2 Watts (Penn.) R. 443; Warden *v.* Green, 6 Ib. 424.

[5] Hale *v.* New Jersey Steam Nav. Co. 15 Conn. R. 539.

[6] Steamboat Co. *v.* Bason, Harp. (S. C.) R. 262. The owners of a steamboat employed in carrying goods for hire between Charleston and Columbia, where held to be common carriers. Swindler *v.* Hilliard, 2 Rich. (S. C.) R. 286; Faulkner *v.* Wright, 1 Rice (S. C.) R. 107.

[7] Jones *v.* Pitcher, 3 Stew. & Port. (Ala.) R. 136; Sprowl *v.* Kellar, 4 Ib. 382. In the former case, the Supreme Court of Alabama held, that a charge in a declaration against joint owners of a steamboat, "that the defendants before and at the time of shipment were the owners and proprietors of the boat, and co-partners in freighting; and which boat had been *usually employed* in conveying and transporting cotton, and other merchandise, for hire," &c., was a sufficient averment of the character of the joint owners, as common carriers, to authorize a recovery.

[8] Bowman *v.* Hilton, 11 Ohio R. 303.

[9] Danseth *v.* Wade, 2 Scam. (Ill.) R. 289.

[10] Porterfield *v.* Humphrey, 8 Humph. (Tenn.) R. 497.

§ 84. But a steamboat *may* be employed *solely* in the transportation of passengers; then the liability is incurred only to the extent of the common rights, duties, and obligations of carrier vessels of passengers; or it may be solely employed in the transportation of goods and merchandise, and then, like other carriers of the like character, the owners are bound to the common duties, obligations, and liabilities of common carriers. Or, the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is *known and avowed*, the owners will not be liable as common carriers, for any other goods or property intrusted to their agents without their consent.[1]

§ 85. The master of a steamboat, like a wagoner, or the driver of a stage-coach, carrying parcels for hire *on his own account*,[2] cannot of course bind the owners as common carriers.[3]

§ 86. Whenever steamboats are employed out of the course of their particular employment, as for instance, in *towing* a freight vessel, they are bound to no more than *ordinary* care and skill in management: they are not then *quo ad hoc* common carriers, and the law of common carriers is not applicable to them.[4] Where a steamboat company, whose regular employment was to transport passengers and merchandise, contracted for hire to take a vessel *through the ice* out of the harbor of Baltimore, and there was no express agreement, that it should be responsible for all losses or injuries which might arise, should the vessel not be carried through in safety; it was held, that the company was only

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[1] Citizens Bank *v.* Nantucket Steamboat Co. 2 Story (Cir. Co.) R. 16.

[2] See *ante*, § 76, 77, 82.

[3] Citizens Bank *v.* Nantucket Steamboat Co. 2 Story (Cir. Co.) R. 49; Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327.

[4] Caton *v.* Barney, 13 Wend. (N. Y.) R. 387.

bound to use reasonable efforts, care and diligence, and was not bound to the extent of common carriers.[1] So far, indeed, from being common carriers, it is questionable whether they are carriers or bailees of any description, for the property towed is not delivered to them, nor placed within their exclusive control; but it remains in the possession, and for most purposes, in the exclusive care of the owners or their servants.[2] It was held, in Alexander *v.* Greene, that the owners of a steamboat undertaking for hire to tow a canal boat and her cargo on the Hudson river, while the master and hands of the canal boat remain on board, and in possession and charge of the property, are not common carriers, but ordinary bailees for hire; and as it was stipulated, that the canal boat was to be towed *at the risk of her master*, the owners of the steamboat were not responsible even for the want of ordinary care and skill.[3]

§ 87. The "subtlety of the human mind," observes Sir William Jones, "in finding distinctions, has no bounds; and it was imagined," he says, "by some, that whatever might be the obligation of a *barge*-master, there was no reason to be equally rigorous in regard to the master of a *ship;* who, if he carry goods for a profit, must indubitably answer for *ordinary neglect* of himself or his mariners, who ought not, they said, to be chargeable for the violence of *robbers*."[4] It

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[1] Penn. Del. and Md. Nav. Co. *v.* Dandridge, 8 G. & Johns. (Md.) R. 109.

[2] Per Bronson, J. in Wells *v.* Steam Navigation Co. 2 Comst. (N. Y.) R. 204.

[3] Alexander *v.* Greene, 3 Hill (N. Y.) R. 1. Though *common* carriers cannot, in New York contract for a restricted responsibility (see on this subject *post*, Chap. VII.) yet *other* bailees for hire may so contract, and leave the whole risk, in cases free from gross negligence, on the owner of the property. The owners of the steamboat in this case, in the particular business in which they undertook to engage, were only ordinary bailees for hire, and therefore might contract for the restricted responsibility for which they did contract. See *ante*, § 59.

[4] Jones on Bailm. 109.

was, however, otherwise decided, he informs us, in the great case of Morse *v.* Slue.[1] In this case, which was decided upon great consideration, it was held by the Court of King's Bench, in the reign of Charles II. that the master of a vessel employed to carry goods beyond sea, in consideration of the freight, was answerable as a common carrier. The circumstances of the case were, that eleven persons came on board of the ship in the river, under pretence of *impressing seamen*, and forcibly took the chests which the defendant had engaged to carry; and though the master was entirely blameless, yet Sir Matthew Hale and his brethren, having heard both civilians and common lawyers, and among them Mr. Holt for the plaintiff, determined on the principles which have been advanced, in respect to the responsibility of common carriers, that the bailor ought to recover. This case, says Sir William Jones, was frequently afterwards mentioned by Lord Holt, who said, that the declaration was drawn by one of the greatest pleaders in England.[2] It was subsequently declared by Lord Hardwicke, that the action lay equally against masters and owners of vessels;[3] and in Goff *v.* Clinkard,[4] the doctrine in the above cases was recognized. In the case of the Proprietors of the Trent Navigation Company *v.* Wood,[5] the action was brought to recover damages of the defendants for goods undertaken by the plaintiffs to be carried from Hull to Gainsborough, the vessel being sunk by striking against an anchor in the river, to which no buoy had been fixed to give notice of the danger; and it was held, "that there being no case which made any distinction between a land and a water carrier, and this injury arising from the negligence of a private man, if this

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[1] Morse *v.* Slue, 1 Ventris, R. 190, 238; Raym. R. 220.

[2] Jones, *ub. sup.* who refers to 2 Ld. Raym. R. 920, Coggs *v.* Bernard, Appx.

[3] Boucher *v.* Lawson, Cases *temp.* Hardw. 183.

[4] Goff *v.* Clinkard, cited in 1 Wils. R. 282.

[5] Proprietors of Trent Nav. Co. *v.* Wood, 3 Esp. R. 127.

sort of negligence were to excuse the carrier, wherever he finds an accident has happened to goods, from the misconduct of a third person, he would give himself no further trouble about the recovery of them ; *and although this might be a sea voyage, and it was usual to insure, the merchant is not bound to insure, nor does that vary the obligation.*" [1]

§ 88. The doctrine of the English Common Law, which renders persons transporting goods for hire by water, for all persons indifferently, liable as common carriers, applies as well to *external* as to *internal* navigation, is the established doctrine in this country.[2] In Massachusetts it has been expressly declared, that a carrier by water by inland navigation, is not only a common carrier, but one also who transports goods from port to port coastwise, or to or from foreign countries.[3] In Crosby *v.* Fitch, in Connecticut,[4] the Court says, " that the defendants, as owners of this vessel, (a sloop running between New York and Norwich in Connecticut,) were common carriers, and, as such, liable for all the responsibilities resulting from that employment, is well settled in the American Courts ; and in England it was never disputed as a principle of mercantile law." The doctrine has been extensively considered in New York, and it is in that State clearly understood to be, that masters and owners of vessels, who undertake to carry goods for hire, are liable as common carriers, whether the transportation be from port to port within the State, or beyond sea, at home or abroad, and they are answerable as well by the Marine Law as the Common Law, for all loss not arising from inevitable accident, or such as could not be foreseen or prevented ; except

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[1] See also Dale *v.* Hall, 1 Wils. R. 282.

[2] 2 Kent, Comm. 599, 600, 606, 608 ; Story on Bailm. § 497, 501. And see *ante*, authorities referred to in § 79, 80 ; Barber *v.* Brace, 3 Conn. R. 9 ; Williams *v.* Grant, 1 Ib. 487 ; Crosby *v.* Fitch, 12 Ib. 410.

[3] Per Shaw, C. J. in Hastings *v.* Pepper, 11 Pick. (Mass.) R. 41.

[4] Crosby *v.* Fitch, *ub. sup.*

so far as the exception is extended to perils of the sea by the special terms of the contract, contained in the charter party or bill of lading.[1] There is, indeed, no doubt that such is the prevailing doctrine in the United States, as part of the Common Law of the land; the slightest neglect, *levissima culpa*, renders the master of a vessel liable.[2]

§ 89. But it is necessary that a ship, like a ferry boat,[3] or steamboat,[4] should have and retain her character and employment, as a common carrier; and when it is said, that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all persons indifferently.[5] Should the owner of a ship employ it on his own account, and, for the special accommodation of a particular individual, take goods on board for freight, (not receiving them for all persons indifferently,) he does not come within the definition of a common carrier, he not holding himself out as engaged in a public employment.[6] If the whole ship is chartered by the owner to a single person, for a particular voyage out and home, for a specified freight, under a charter party, the charter party will be held to regulate the rights, duties, and responsibilities of the parties, and supersede those of the ship owner, as a common carrier.[7]

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[1] Elliott *v.* Rossell, 10 Johns. (N. Y.) R. 1; Kemp *v.* Coughtry, 11 Ib. 107; M'Arthur *v.* Sears, 21 Wend. (N. Y.) R. 190.

[2] 2 Kent, Comm. 609. With respect to the owners, although they do not in truth enter into the undertaking, they are yet liable, as well in respect of the freight received, as also for the appointing of the master, whom they may elect and control; but when charged in point of contract, as employers, they must all be joined. Boson *v.* Sandford, 2 Salk. R. 439; 3 Lev. R. 258; Carth. R. 62.

[3] See *ante*, § 82.

[4] See *ante*, § 84, 85.

[5] Story on Bailm. § 501; Abbott on Shipp. Pt. 3, ch. 2. But see *ante*, modern definition of common carriers, § 70.

[6] Story on Bailm. § 501.

[7] 2 Kent, Comm. 600; Story on Agency, § 452–461; Ellis *v.* Turner,

§ 90. Carriers by water being liable at Common Law to the same extent as carriers by land, and as their responsibility was more extensive and their risk greater, from the facilities for the commission of acts of fraud and violence upon the water, it was deemed, in England, a proper case for legislative interference, to a limited extent. The statutes of 7 Geo. II. ch. 15, and 26 Geo. III. ch. 159, exempted owners of vessels from responsibility as common carriers for losses by fire; and provided, further, that the owner should not be liable, for the loss of gold, silver, diamonds, watches, jewels, or precious stones, by robbery or embezzlement, unless the shipper inserted in the bill of lading, or otherwise declared in writing to the master or owner of the vessel, the nature, quality, and value of the articles; nor should he be liable for embezzlement, or loss or damage to the goods arising from any act or neglect, without his fault or privity, beyond the value of the ship and freight; nor should part-owners, in those cases, be liable beyond their respective shares in the ship and freight.[1] The statute 53 Geo. III. further limited the responsibility of ship owners for damage done, without their fault, to other vessels or their cargoes, to the value of the ship doing the damage, at the time of the accident.[2] In Massachusetts, the responsibility of owners was, by a statute passed in 1818, and re-enacted in the Revised Statutes of 1835,[3] limited to the value of their interest in the ship and freight, in cases where they were liable for loss or damage occasioned by the acts of the master or mariners. By the statute of New York, of April 13, 1820, ch. 202, the conduct of canal boats are under specific regulations, and freight

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1 T. R. 531, cited in Jeremy on Carr. 48; Cavenagh *v.* Such, Price, R. 328; Williams *v.* Cranston, 2 Stark. R. 82; Hyde *v.* Trent and Mersey Nav. Co. 5 T. R. 397, cited in Jeremy on Carr. 64; Boyce *v.* Chapman, 2 Bing. N. Cas. 222.

1 Wilson *v.* Dickson, 2 B. & Ald. R. 2.

2 See 2 Kent, Comm. 606.

3 Part 1, tit. 12, ch. 32, sec, 1, 2.

boats are bound to afford facilities to the passage of packet or passenger boats, through the locks and on the canals, and the masters and owners are held responsible in damages for injuries resulting from any undue non-compliance with their duty.[1]

§ 91. In respect to the acts of *agents*, and persons in the employment of a carrier, the maxim *respondet superior* applies, and he is equally liable for their acts and for his own. In North Carolina, it has been held, that if a man's *slave* acts for him as a ferryman, the master is considered a common carrier.[2] Any arrangement made between a carrier and his agent or servant, whereby the latter are to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss of such parcels, unless such an arrangement is known to the owner thereof, so that he contracts exclusively with the servant or agent.[3] It has been already shown, that the mere fact, that the driver of a stage-coach, or the master of a steamboat, is accustomed to carry packages of a particular description, especially for his own personal emolument, will not make the proprietors responsible therefor, as common carriers.[4]

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[1] Farnsworth *v.* Groot, 6 Cow. (N. Y.) R. 608; and see 2 Kent, Comm. 606, note *b*.

[2] Spivy *v.* Farmer's Adm'r, 1 Mur. (N. C.) R. 339.

[3] Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327; Story on Bailm. 506; Citizens Bank *v.* Nantucket Steamboat Co. 2 Story (Cir. Co.) R. 16. Bostwick *v.* Champion, 11 Wend. (N. Y.) R. 580. Every person employed by one who is a common carrier, whether by the name of sub-contractor, servant, or otherwise, to perform any part of the work which the carrier has undertaken to perform; and every person employed by such person for that purpose, it has been held, is a "servant in the employ of the carrier," with the 11 Geo. 4 & Will. 4, which renders common carriers liable for the felonous acts of servants in their employ. Machu *v.* London & Southwestern Railr. Co. 12 Jur. 501; 17 Law Journ. 271.

[4] Bean *v.* Sturtevant, 8 N. Hamp. R. 325, cited *ante*, § 77, and see *ante*, § 85. For the doctrine of the liability of master for the acts and negligence of his agents and servants, see also *post*, § 572 - 582.

§ 92. As an action lies against a principal for an injury done to another, through the negligence or unskilfulness of his servants, while acting in his employment, so *partners* are responsible in the same way, for the conduct of one of them as their servant, in, for instance, driving against carriages, or running down ships. In these cases, if the carriage or the ship by which the damage is done is the joint property of the partners, it is unimportant whether it was under the guidance of one of the partners, or under the care and management of their servants, for *qui facit per aliam facit per se.*[1]

§ 93. It is not unusual for several persons to be engaged as partners in carrying goods by land, and by contract *inter se*, one of them is to find horses and drivers for a certain distance on the route, and the other for the remaining distance; and when such an arrangement is made, they are jointly responsible as partners, throughout the entire route. And, although all the partners may not have an interest in the vehicle, yet all will be held responsible, as such, upon any contract made by their agent, for the carriage of any package sent by either of the vehicles, and consequently, for the loss of it.[2] In a case, where A, the keeper of a coach-office,

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[1] Bostwick *v.* Champion, 11 Wend. (N. Y.) R. 580, and the authorities there cited by Nelson, J.

[2] Story on Bailm. § 506; and see Bostwick *v.* Champion *ub. sup.* Where the defendant and one Dyson were carriers from London to Gosport, and by an arrangement between them, Dyson horsed the wagon from London to Farnham, and the defendant then conducted to Gosport, and at the time the mischief complained of happened, the wagon was drawn by Dyson's horses, and driven by a servant of his, who had been hired by, and received wages from, Dyson, and with whose employment the defendant had no concern whatever, but *the wagon itself was the property of the defendant;* it was held, that the defendant and Dyson were both jointly interested in the profits, and that, notwithstanding this private agreement, were jointly responsible to third persons for the negligence of their drivers throughout the whole distance. Waland *v.* Elkins, 1 Stark. R. 272. Since it was no objection, said the Court, that Dyson was not joined, the case was the same as if the defendant received all the profits.

and part owner in several coaches, made a contract with B, for the carriage of parcels which he was in the habit of sending from that office to various places; it was held, that this bound the owners of all the coaches, in which A was a part owner, and as well those who became partners after the making of the contract, as those who were so before.[1] Thus, also, where A, B, and C run a line of stage-coaches from Utica to Rochester, and the route was divided between into sections, the occupant of each section furnishing his own carriages and horses, hiring drivers, and paying the expenses of his own section; and the money received as the fare of passengers, deducting therefrom only the tolls paid at the turnpike gates, was divided among the parties in proportion to the number of miles run by each; and an injury was done to a third person through the negligence of the driver of the coach of A; it was held, that a joint action on the case at the suit of the party injured, lay against B and C, as well as A.[2]

§ 94. So, likewise, with *shippers*. Where an association was formed between shippers on Lake Ontario, and the owners of canal boats on the Erie Canal, for the transportation of goods and merchandise between the city of New York, and the ports and places on Lake Ontario and the river St. Lawrence, and a contract was entered into by the agent of such association for the transportation of goods from the city of New York to Ogdensburg, on the river St. Lawrence, and the goods were lost on Lake Ontario; it was held, that all the defendants were liable for the loss, although some of them had no interest in the vessel navigating the lake.[3]

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[1] Helsby *v.* Mears *et al.* 5 B. & Cres. R. 504.

[2] Bostwick *v.* Champion, *ub. sup*; and see Weed *v.* Schenectady and Saratoga Railroad Co. 19 Wend. (N. Y.) R. 534.

[3] Fairchild *v.* Slocum, 19 Wend. (N. Y.) R. 329. This is not like the case of Roberts *v.* Turner, 12 Johns. R. 232. There the defendant was a mere warehouse-keeper and forwarder of goods; and the course of business was, for him to receive merchandise or produce at his store, and

§ 95. In the absence of any partnership connection between one route and another one united with it, persons receiving goods, as common carriers, continue to be responsible, in that character, until the goods are delivered at the place to which they are directed, even if the place to which they are directed is beyond the limits of the place to which they are accustomed to carry and deliver. A parcel was delivered at Lancaster, to the Lancaster and Preston Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said, it had better be paid by the person to whom it was directed, on the receipt of it. The company were known to be the proprietors of the line only as far as Preston, where the railway unites with another line called the North Union line, and that afterwards with a third line, and so on into Derbyshire. The parcel having been lost after it had been forwarded from Preston, it was held, that the company were liable for the loss.[1] That a railroad company, undertaking to carry passengers and their baggage beyond the limits of their own road, are beyond doubt liable for losses which occur on any part of the route in respect to which the contract is made, was held, in the case of The Schenectady and Saratoga Railroad Company; who, having undertaken to carry from the Springs at Saratoga to Albany, they could not be allowed to say, that they were carriers no farther than Schenectady, the termination of their own road.[2] Common carriers employed in the transportation of goods on the Hudson River, between New York and Albany, *if they receive* a package directed to a place beyond Albany, and

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forward it by boatmen on the Mohawk River. He was not, therefore, a carrier, but an intermediate agent between the owner and the carrier.

[1] Muschamp *v.* Lancaster and Preston Railway Co. 8 M. & Welsb. R. 421.

[2] Weed *v.* Schenectady and Saratoga Railroad Co. 19 Wend. (N. Y.) R. 534. The same doctrine recognized by the Supreme Court of Florida. Bennett *v.* Filyaw, 1 Florida R. 403.

give an acceptance of it, without specially limiting their responsibility no farther than Albany, are held liable for the loss of the goods, happening after their delivery at Albany. The box in question, was directed to " J. Petrie, Little Falls, Herkimer Co.," and was delivered on board for the express purpose of transshipment to him, and was there received by the agent, who gave his receipt therefor. This, in effect, the Court considered, was the agent's saying to the plaintiff, that he would take and deliver it at the place of destination.[1]

§ 96. The preceding cases are different from that of Garside *v.* Trent and Mersey Navigation Company, where the defendants undertook to carry goods from Stourport to Manchester, and *to forward them from thence* to Stockport; they were not held liable after the goods had been safely lodged at Manchester, because it appeared, that they were only common carriers as far as Manchester, and their obligation ceased as soon as they had deposited them there in safety. They then took charge of the goods merely as *warehousemen*, for the convenience of the plaintiff, to keep them till the Stockport carrier called for them.[2]

§ 97. If common carriers then intend, in any case, to limit their responsibility, in that character, *short* of the place to which the goods are directed, they are bound in some way *to indicate such intent*.[3] Otherwise, if such place was no more than one mile beyond the terminus of the carrier's

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[1] St. John *v.* Van Stantwood, 25 Wend. (N. Y.) R. 660. But this decision was overruled by the Court of Errors on the ground that the evidence was such that the carriers ceased to be such on the arrival of the goods at Albany, and that they became then mere *forwarders* of the goods. Vanstantwood *v.* St. John, 6 Hill (N. Y.) R. 157. As to the distinction between *carriers* and *forwarders*, see *ante*, § 75, and see also *post*, § 281.

[2] Garside *v.* Trent and Mersey Navigation Co. 4 T. R. 581. And see Boehm *v.* Coombe, 2 M. & Selw. R. 172; Thomas *v.* Boston and Prov. Railroad Co. 10 Met. (Mass.) R. 472; and see *ante*, § 75.

[3] St. John *v.* Van Stantwood, *ub. sup.*

established route, and the goods are lost on the other side of it, the owner of the goods is to find out somebody or other, who is to be liable, in respect of the carriage for that one mile. It was said in the English Court of Exchequer, by Lord Abinger, C. B., in the case above cited : — " Particular circumstances might no doubt be adduced to rebut the inference which, *primâ facie*, must be made of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as *conclusive* evidence of the contract sued on by the plaintiff; it is only *primâ facie* evidence of it; and it is useful and reasonable for the benefit of the public, that it should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward." [1]

§ 98. Carriers who contract with the *agent of the owner of goods* for their transportation, are of course none the less liable, as common carriers, to the owner. Thus, if a person who has established what is called an *express line*, for the conveyance of goods, money, &c., for all who will employ him, has a contract in his own name with a steamboat company for their conveyance, and delivers goods or money on board to be transported, and the goods or money are lost by negligence, the owner may sustain an action against the company; and it makes no difference whether the name of the owner is disclosed by the agent, to the company, or not.[2]

§ 99. Secondly. Since it appears, that neither the element on which goods are carried, nor the nature, magnitude, and form of the carriage make any difference, the question is,

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[1] Muschamp *v.* Lancaster and Preston Railway Co. 8 M. & Welsb. R. 421.

[2] New Jersey Steam Navigation Company *v.* Merchants Bank, Dec. Term of Sup. Court of U. States, 1847; and see the case in the Appx.

whether there is a diversity between *one kind of goods and another*. Persons undoubtedly may be common carriers of goods, although they are not precisely of the same kind and description that have before been carried by them for hire; unless, indeed, they be such that the person delivering them has good reason to suppose that they are not within the scope of the agent's authority to receive and transport. Thus, in our commercial cities, it is every day's practice for ship-masters and other agents to receive and transport new kinds of goods which were before unknown, and yet it was never, and never could reasonably, be questioned, that the ship-owner was equally liable, as if he had been personally present and had agreed to transport the new article. But the owner of a *passage* boat carrying light freight, might not be answerable for a cargo of coal or of marble, taken on board by the master, although he had been in the habit of carrying small pieces or specimens of either for hire. In the last case, the party who contracted with the agent, would have good reason for presuming that the agent was acting contrary to the wishes of his principal; and if such were really the fact, the latter would probably not be held liable.[1] Where there is a meditated *concealment* of the nature and value of the goods delivered to the carrier, (as by their being locked up in a chest,) and they are of extraordinary value, and that fact is not communicated to the carrier, and, in consequence, the same care is not taken of the goods by the carrier, as would otherwise have been, and they are lost, whether the carrier will be then exonerated, will be considered in another place.

§ 100. The expression generally used, is "a common car-

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[1] See the opinion of Walworth, Chancellor, in Sewall *v.* Allen, 6 Wend. (N. Y.) R. 346; and see King *v.* Lenox, 19 Johns. (N. Y.) R. 235. To charge a person as common carrier, it must be shown, that the usage of his business includes the goods forwarded, or that there was a special contract to carry them. Tunnel *v.* Pettijohn, 2 Harring. (Del.) R. 48.

rier of *goods*," but a carrier of *money* may be as much bound as a common carrier of goods, if to carry it is the common usage of the business in which he is engaged, and if it be his well known practice to take charge of it for conveyance.[1] Thus, in the case of Dwight *v.* Brewster, in Massachusetts,[2] it is affirmed, that the proprietors of a stage-coach are liable where they act as common carriers, and the profit made by the carriage of bank bills is within the *scope of their business*, and for *their* account.

§ 101. In Allen *v.* Sewall, in New York,[3] it was held, that, on the principle of the responsibility of common carriers, owners of a steamboat carrying light freight and parcels for hire, as well as passengers, were answerable for the loss of a package of *bank bills* delivered to the captain for carriage; and, also, that instructions to the captain of a vessel, employed in the carrying business, not to carry money, does not excuse the owners, unless notice of such instructions is brought home to the shipper. But this case was reversed, on the ground, that bills were not "goods, wares, and merchandise" within the meaning of the charter incorporating the steamboat company, whose agent the defendant was; and also on the ground, that the carriage of such bills was not a part of their *ordinary business*, and was forbidden by instructions to the master.[4]

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[1] Story on Bailm. § 495; Kemp. *v.* Coughtry, 11 Johns. (N. Y.) R. 109; Sheldon *v.* Robinson, 7 N. Hamp. R. 157; Emery *v.* Hersey, 4 Greenl. (Me.) R. 407; and see Harrington *v.* M'Shane, 2 Watts (Penn.) R. 443; Merwin *v.* Butler, 17 Conn. R. 138; New Jersey Steam Nav. Co. *v.* Merchants Bank, Dec. Term Sup. Co. of U. S. 1847, Appx. See *ante*, § 84.

[2] Dwight *v.* Brewster, 1 Pick. (Mass.) R. 50.

[3] Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327.

[4] 6 Wend. (N. Y.) R. 335. "If I were compelled," says Mr. J. Story, "to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the Court of Errors the best founded in the principles of law." Citizens Bank *v.* Nantucket Steamboat Company, 2 Story (Cir.

§ 102. In the case of the Citizens Bank *v.* The Nantucket Steamboat Company, (a suit in admiralty,) the suit was in substance brought to recover from that company a sum of money in bank bills and accounts, belonging to that bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried from the island of Nantucket to the port of New Bedford, which money had been lost, and never duly delivered by the master. The charter incorporating the company, granted a right to run a steamboat "for the transportation of merchandise." It was held, that the term "merchandise" does not apply to merely evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold; and that in order to render the company liable, it must be clearly proved, that they had held themselves out to the public as common carriers of bank bills for hire, and that they had authorized the master to contract on their account, and not on his own, for the carriage thereof. That the *onus probandi* was on the libellants to make out a *primâ facie* case, in the affirmative; and then the *onus probandi* of disproving this inference was shifted upon the respondents. That the knowledge of the owners, that the master carried the money for hire, would not affect them, unless the hire was on *their* account, or unless the master held himself out as their agent in that business, within the scope of the usual employment and service of the steamboat.[1]

Co.) R. 49. Kent seems to entertain a like opinion. 2 Kent, Comm. 698, note.

[1] Citizens Bank *v.* Nantucket Steamboat Company, 2 Story (Cir. Co.) R. 16. In the case of Sewall *v.* Allen, in the Court of Errors of New York, it was held, it has been shown, that a steamboat charter authorizing the company to transport "goods, wares, and merchandises," did not necessarily include the carriage of bank bills, so that, unless the company actually made that as a part of their ordinary business of common carriers, they were not liable for any loss thereof. The judgment of Mr. J. Story

§ 103. The general principles of law upon this subject cannot be too well understood, and they are well illustrated by Mr. J. Story, in the case just above cited, as follows: "The transportation of passengers or of merchandise, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the coachmen employed by them to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. *A fortiori*,

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strongly inclined to the same conclusion. In the charter of the Citizens Bank it appeared, in their suit against the Steamboat Company, the word "goods" is not found. If it were, said the learned Judge, there might be more difficulty encountered in construing it; as it was, he had been unable to persuade himself, that either the corporation or the legislature, under the word "merchandise," meant to include bank bills, as an object of regular transportation for hire. It was incumbent, he said, upon those who assert that the charter includes such an expanded meaning, to show, by some clear and determinate proofs, that the company have positively adopted and acted upon that meaning. The decree of the District Court, dismissing the libel with costs, was affirmed. The ground of defence of the company was, that, in point of fact, although the transportation of money and bank bills by the master was well known by them, yet it constituted no part of their *own business or employment;* that they never, in fact, were common carriers of money and bank bills; that they *never held themselves out to the public* as such, and never received *any compensation* therefor; that the master, in receiving and transporting money and bank bills, acted as the *mere private agent of the particular parties*, and not as the agent of the company or by their authority.

they would not be liable for the carriage of parcels of money or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner, not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done, by his negligence, to a passenger whom he had casually taken up on the road. In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties, and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged? They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily employed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers, as to all such matters within the scope of their employment and business. But in respect to the carriage of bank bills, perhaps very different usages do, or at least may, prevail in different routes, and different ports. But, at all events, I do not see how the Court can judicially say, that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, common carriers, not only of passengers, but of goods and merchandise and money on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion."

§ 104. If by the *usage of trade*, the carrier of the goods is to act as the agent for the sale of them at the port of destination, and to return the net proceeds to the shipper, it seems that when he receives the money arising from the sale, his liability as a common carrier re-attaches, and he is answerable, as a common carrier, for the loss of the money; and on this subject, the principles advanced in the preceding section may be applicable. In Kemp *v.* Coughtry,[1] the master of a coasting vessel was employed to carry goods from Albany to New York, and the usual course of trade was for the master to sell the goods at New York, without charging any thing more than the ordinary freight, and to account to the owner of the goods for the proceeds, and not to the owner of the vessel. The master, after receiving the goods, carried them to New York, and sold them there, and brought the money, the proceeds of the sale, on board, and put it in his trunk. The cabin, though locked, in the absence of the master and crew was broken open, and the money stolen. The Court held, upon this state of facts, that the owners were responsible for the loss, and treated the case as one arising against them in the character of common carriers. The view taken by the Court was, that the money, when on board, was to be considered the same as a return cargo, purchased with the proceeds of the goods.[2]

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[1] Kemp *v.* Coughtry, 11 Johns. (N. Y.) R. 107.

[2] Upon the decision in this case, Story, in his work on Bailments, has thus commented: "Upon the actual posture of the facts in this case, the very question was, whether the very specific money on board was to be treated as cargo, or was to be carried back for hire; and whether the master was bound to carry back the specific money received by him, or was only bound to pay over and account to the shipper for the amount and value of the proceeds in any money whatsoever. Now, it is certainly no part of the duty of a common carrier to sell goods and to account for the proceeds. If he sells, it is not as a carrier, but as a *factor*. The owners of the vessel may be liable for his acts as factors, if the course of trade makes him their agent in the business of selling. But, when there is a right delivery of the goods at the place of destination, the duty of the car-

§ 105. In Emery *v.* Hersey, in Maine, it appeared, that the defendant's sloop was employed in carrying wood and lumber, on freight, from the river Saco; and that the plaintiff shipped on board of the sloop, on freight, a certain quantity of lumber to be sold by the master, and the net proceeds to be paid over to the plaintiff. It appeared also by the testimony, that the usage at Saco was, when lumber is shipped on freight, for the master to sell it, and bring home the money and pay it over to the shipper. It was held, that where, in the usual course of business, goods shipped on freight are consigned to the master for sales and returns, the owner of the vessel is liable, as well for the payment of the proceeds to the shipper, as for the safe transportation of the goods; and the Court referred to the decision in the case of Kemp *v.* Coughtry as an authority directly in point.[1] This case, with the preceding one, was considered in the case of Harrington *v.* M'Shane, in the Supreme Court of Pennsylvania; and it was held in this case, that, where the owners of a steamboat took produce for a certain freight to be carried from Pittsburg to Louisville, and to be sold by them, and were bringing back, in the same vessel, the money which they obtained on the sale of the produce, when the vessel and money were accidentally consumed by fire, the owners, under the usage of trade on the western waters, were acting as

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rier, as such, would seem to cease; and the duty of factor to commence. If the specific money received, or any other goods bought with it, are to be returned in the same vessel to the original port, and the freight paid contemplates that course of trade, as soon as the goods or money are put on board for the purpose of the return carriage, the liability of the carrier certainly re-attaches. But the evidence in the case went to show, not that there was to be any such return of the particular money or goods in the vessel, but merely, that there was a liability of the master to account for the proceeds to the owners of the goods, and not to the owner of the vessel. Perhaps the application of the law to the facts, rather than the law itself, as laid down in the case, would deserve farther consideration." See Allen *v.* Sewall, 2 Wend. (N. Y.) R. 227; S. C. 6 Wend. R. 363.

[1] Emery *v.* Hersey, 4 Greenl. (Me.) R. 407.

common carriers in going, as factors in selling the produce, and as common carriers in bringing back the money; and that they were liable for the loss of the money, notwithstanding the accident.[1]

§ 106. But the usage in such cases, like all commercial usages, must be clearly proved. The captain of a steamboat, who was part owner, took flour on freight, and undertook to sell it; and after selling it, failed to account for the proceeds to the freighter; and the owners, it was held, were not bound by his contract, in the absence of proof, that he had express authority from them, or implied authority from the usage of trade, to act as factor, and the Court refer to the decision in the case of Kemp *v.* Coughtry, in New York, as being founded on the usage of trade between New York and Albany.[2] If a common carrier by whom goods are sent to A, sells them to B, such sale vests no title; and, to take a case out of the operation of this principle, on the ground of the usage of trade, the usage must be well established, certain, uniform, and reasonable. But if the owner of a horse send it to a repository of sale, it must be intended as an implied authority to sell it; or, if one send goods to an auction room, it cannot be supposed that he sent them there merely for safe custody. So the principle is not denied, that if a person sends, by a carrier, merchandise, or produce, to a place, where it clearly appears to be the *ordinary* business of the carrier to sell, it must be intended that the commodity was sent thither for the purpose of sale.

§ 107. It has been a matter of considerable discussion, whether the usual *baggage* taken with them by persons in travelling in stage-coaches, rail-cars, steamboats, &c. are to be regarded as in the custody of the proprietors of those conveyances, in the character of common carriers. It has

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1 Harrington *et al. v.* M'Shane, 2 Watts (Penn.) R. 443.

2 Taylor *v.* Wells, 3 Watts (Penn.) R. 65.

ever been agreed on all hands, that the proprietors do not warrant, in that character, the safety of the persons of the passengers, though, as will be shown in a separate chapter, they are responsible for due care in respect to that. That the proprietors were not responsible as common carriers for the *baggage* of the passengers, unless a distinct price was paid for it, was twice held by Lord Holt; and he considered it not usual to charge for baggage, unless it exceeded a certain amount in weight or quantity.[1] But, inasmuch as the custody of the baggage is an accessary to the principal contract,[2] it is considered, that coach proprietors, &c. should be placed, in respect to baggage, upon the ordinary footing of common carriers.

§ 108. So the law is now considered to be in England.[3] Thus, in a modern case, in an action against a coach proprietor, to recover damages for the loss of a trunk; the plaintiff, it appeared, being about to travel from Bath to Truro, took a place at the defendant's coach office. At Taunton, when the coach was changed, for the convenience of the proprietor, the plaintff was assured by the coachman, that the trunk had been safely stowed on the top of the coach, the second vehicle being deficient in the accommoda-

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[1] Middleton *v.* Fowler, 1 Salk. R. 282; Upshaire *v.* Aidee, Comyn, R. 25; and see Jeremy on Carr. 11, 13.

[2] It is said in the Civil Law, that, by a delivery of the principal thing, that which is accessorial does not pass; as if a slave, with his clothing on, is deposited; or a horse with his halter; neither the clothes nor the halter are deposited. But this doctrine, if true at all in our law, must be received with many qualifications. It must always depend upon the *intent of the parties*. Story on Bailm. § 54. According to this rule, the contract to carry the baggage of a passenger by usually receiving baggage, subjects the proprietor to the responsibility of a common carrier of goods in general; as it is at least as much intended by the passenger, that his trunk containing his necessary baggage, should be safely transported, as it is intended by the shipper of a barrel of flour, that that should be.

[3] 1 Bell, Comm. 467, 468.

tion of a *boot*, which the first afforded. On arrival at the place of destination, the plaintiff missed his trunk, which contained apparel and jewels; and it was held, that the defendant was liable to make compensation to the owner, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the defendant's office limiting his responsibility to five pounds, in the absence of such disclosure; which notice the owner of the trunk, having been in the office, had an opportunity of seeing.[1]

§ 109. In Peixotti *v.* M'Laughlin, in the Court of Appeals of South Carolina, in 1847,[2] in which it was held, that a stage contractor is a common carrier, and liable as such for all loss of baggage, Richardson, J., who delivered the opinion of the Court, observed: — "The strict liability of common carriers by the Common Law, has been fully recognized in this State, in many cases, and the general doctrine is established. The liability of ferrymen as common carriers, so often adjudged, is very analogous to the present case. The ferryman takes over a man — say for ten cents; but the man carries a pack, there can be no doubt the ferryman would be liable for the loss of the pack, although he takes no toll separately for the packs. So, if the contents of a wagon or of the load upon a horse be lost; because, all must be necessarily placed in the custody of the ferrymen. The stage contractor, the ferryman, the boatman, railroad companies, and wagoners, are alike carriers over the public highway, and stand all in the same parity of reasoning, i. e., they come within the same necessary and strict legal policy of guarding against robberies or cheats by those, who, having the custody, are enabled to do wrong secretly."

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[1] Brook *v.* Pickwicke, 4 Bing. R. 218. As to the effect of *notices* in limiting carrier's responsibility, it will be fully considered *post*, Chapter VII. See Cairns *v.* Robins, 8 M. & Welsb. R. 258.

[2] Peixotti *v.* M'Laughlin, 1 Strob. (S. C.) R. 468.

§ 110. It was formerly held, say the Supreme Court of New York, that the owner of the vehicle or boat was not answerable as a carrier for the luggage of the passenger, unless a distinct price was paid for it; but it is now held, that the carrying of the baggage is included in the principal contract, in relation to the passenger; and the carrier is answerable for the loss of the property, although there was no separate agreement concerning it. A contract to carry the ordinary baggage of the passenger is implied from the usual course of the business; and the price paid for fare is considered as including a compensation for carrying the freight.[1] The practice of requiring freight for baggage if over a certain weight, well illustrates that baggage under that weight is fully paid for, by the personal passage money of the traveller.[2] It was affirmed by Chancellor Walworth, in Powell *v.* Myers, in the Court of Errors of New York,[3] that the salutary rule of holding the owners of steamboats, railroads, canal-boats, stage-coaches, &c. liable for losses, other than those arising from public enemies or inevitable accidents, and which is so essential to the preservation of the baggage of the otherwise unprotected traveller against the negligence of the carriers, or the frauds of their servants, should not be impaired by any decision of that Court; and the opinion of the Court of Errors was, that such owners were liable as common carriers, for the safety of baggage, until its delivery to the owner. The doctrine is laid down with great rigor in Ohio, in which State it has been held,

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[1] Hawkins *v.* Hoffman, 6 Hill (N. Y.) R. 586; Bennett *v.* Dutton, 10 N. Hamp. R. 481; Logan *v.* Ponchartrain Railroad Co. 11 Rob. (Louis.) R. 24.

[2] Peixotti *v.* McLaughlin, 1 Strob. (S. C.) R. 468.

[3] Powell *v.* Myers, 26 Wend. (N. Y.) R. 591. See also Hollister *v.* Nowlen, 19 Ib. 234; Cole *v.* Goodwin, Ib. 251, and the cases therein referred to by Justices Bronson and Cowen; Orange County Bank *v.* Brown, 21 Ib. 254; Camden and Amboy Railroad Co. *v.* Burke, 13 Ib. 611.

that the proprietors of stage-coaches are common carriers, and that their liabilities cannot be limited even by actual notice to a traveller, that his baggage is at his own risk.[1] In Pennsylvania, in a suit against stage owners for loss of baggage, it was held, *that payment of the fare* need not be expressly proved; for it may be inferred without violent implication, inasmuch as the payment of fare is seldom or ever neglected. But even if the fare is not paid, the passenger is liable to pay it; and this obliges the owners of a stage-coach to the exercise of diligence.[2]

§ 111. The fact that stage contractors, &c. do not enter the baggage upon the way-bill, does not alter their liability as common carriers for the loss of such baggage, as the way-bill is altogether *ex parte*, and is not, like a bill of lading, a contract.[3]

§ 112. Although *hackney coachmen* are not deemed common carriers of goods or merchandise, their employment being more for the conveyance of passengers than for the carriage of goods,[4] yet, as to the *baggage* of the passengers they carry, and hold themselves out to carry with their baggage, there is as much reason that they should be responsible in the character of common carriers, in respect to such baggage, as the owners of stage-coaches, &c. It is ordinarily the case, that hackney coachmen are accustomed to carry the baggage of passengers, although they receive no specific compensation therefor, but simply receive the fare for the transportation of the traveller; yet, like common carriers, they are responsible for the safety of such baggage; since *it constitutes a part of*

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[1] Jones *v.* Voorhees, 6 Ohio R. 358.

[2] McGill *v.* Rowland, 3 Barr. (Penn.) R. 451; and see also Bingham *v.* Rogers, 6 Watts & S. (Penn.) R. 495; Whitesell *v.* Crane, 8 Ibid. 369.

[3] Peixotti *v.* McLaughlin, 1 Strob. (S. C.) R. 468.

[4] Jeremy on Carr. 13, 14; Upshaire *v.* Aidee, Comyn, R. 25.

the service for which the fare is paid, and the passengers are thereby induced to travel in the coach, and the custody of the baggage may be deemed, as in the case of an innkeeper, an accessary to the principal contract.[1] Still it is a question of fact, whether a hackney coachman or a cabman, professes to carry both passengers and baggage, and if it so appear, he is clothed with the obligations and responsibilities of a common carrier of goods for hire.[2]

§ 113. Coach proprietors, &c. are held liable as common carriers for the baggage of passengers, even if the owner of the baggage is present, or sends his servant to look after the baggage; unless there be *fraud* on the part of the owner. In Robinson *v.* Dunmore, Chambre, J., said: — "It has been determined, that if a man travel in a stage-coach, and take his portmanteau with him, though he has an eye on the portmanteau, yet the carrier is not absolved from his responsibility.[3] But the law is equally rigid, that the baggage should be fairly in the custody of the carrier; for where an action was brought against a railroad company, for the loss of an *overcoat* belonging to a passenger, and it appeared that the coat was not delivered to the defendants, but that the passenger having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and that it was afterwards stolen; the defendants were not held liable.[4]

§ 114. The arrival, with the baggage in safety, at the place of destination, will not discharge the carrier until its delivery to the owner; although, unless demanded in a reasonable time, the liability of the carrier, in his strict character

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[1] Story on Bailm. § 498.

[2] Ross *v.* Hill, 15 Law Jour. N. S. (C. P.) 182, cited in Addison on Contr. 804.

[3] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 47; and see Cole *v.* Goodwin, 19 Wend. (N. Y.) R. 251.

[4] Tower *v.* Utica and Schenectady Railroad Co. 7 Hill (N. Y.) R. 47. And see *post*, § 140.

of a *common* carrier, will not continue.[1] No passenger is required, however, to expose his person in a crowd, or endanger his safety in the attempt to designate and claim his baggage; but if the delivery is made in conformity to a usage, so well established and notorious, that it is to be presumed that the owner had knowledge of it, the carrier will be discharged.[2]

§ 115. The implied undertaking of the proprietors of stage-coaches, railroads, and steamboats, to carry in safety the baggage of passengers, is not unlimited, and cannot be extended beyond *ordinary* baggage, or such baggage as a traveller usually carries with him for his personal convenience.[3] It is never admitted to include *merchandise;* and it has been expressly held, that although the owners of steamboats are liable, as common carriers, for the baggage of the passengers, that is, for such articles of necessity and personal convenience as are usually carried by passengers, they were not liable for the loss of a trunk containing valuable merchandise, and nothing else; which trunk was lost after being taken on board the steamboat, and deposited with the ordinary baggage.[4] Neither does the implied undertaking include a large sum of *money.* In a case very fully argued, it has been expressly decided, that where the baggage consists of an ordinary travelling trunk, in which there was a *large* sum of money ($11,250,) such money is not considered as included in the term baggage, so as to render the carrier responsible

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1 Powell *v.* Myers, 26 Wend. (N. Y.) R. 591; Hollister *v.* Nowlen, 19 Wend. (N. Y.) R. 234. Interference by the owner, by giving directions as to the care of the property, the transportation of which is interrupted by the closing of a river, is not of itself an acceptance of the property by the owner, but merely evidence of it to be submitted to the jury, with the other circumstances of the case. Bowman *v.* Teall, 23 Wend. (N. Y.) R. 306.

2 Cole *v.* Goodwin, 19 Wend. (N. Y.) R. 251.

3 Hawkins *v.* Hoffman, 6 Hill (N. Y.) R. 586.

4 Pardee *v.* Drew, 25 Wend. (N. Y.) R. 459.

for it.[1] It was suggested in this case, that money in a trunk to pay travelling expenses might be included; but that was doubted, as men usually carry money to pay travelling expenses about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage. An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be at all extended beyond such things as the traveller usually has with him as a part of his baggage. All articles which it is usual for persons travelling to carry with them, whether from necessity or for convenience, or amusement, (such as a *gun*, or *fishing tackle*,) fall within the term baggage.[2] So, likewise, does *money*, not exceeding a reasonable amount;[3] and a *watch* has been held to be a part of a traveller's baggage, and his trunk a proper place in which to carry it.[4]

§ 116. The Supreme Court of Pennsylvania have considered, that it is not obvious in what manner the Court can restrict the quantity or value of the articles that may be deemed proper or useful for the ordinary purposes of travelling; because in the nature of things, it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a Court must rely upon the intelligence and integrity of the jury to apply the proper corrective. The defendants, in this case, requested the Court to charge the jury, that they, (the defendants) having had no notice that the trunks in question contained *jewelry*, or other articles of greater value than ordinary wearing apparel, they were

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[1] Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 85; and see Gibbon *v.* Paynter, 4 Burr. R. 2298; Batson *v.* Donavan, 4 B. & Ald. 340.

[2] Orange County Bank *v.* Brown, *ub. sup.*

[3] Weed *v.* Schenectady and Saratoga Railroad Co. 19 Wend. (N. Y.) R. 534; Cole *v.* Goodwin, *ub. sup.*

[4] Jones *v.* Voorhees, 6 Ohio R. 358. See Tudor *v.* Boston & Maine Railroad Co. 13 Shep. (Me.) R. 458; and *post*, § 475, *et seq.*

not liable for such articles of jewelry; but the Court refused, and the jury found for the plaintiff; and judgment was affirmed in error.[1]

§ 117. The *Common Law* knew no distinction, in respect to the liability of a common carrier, between a *letter* and any other thing; and a *private postmaster* was precisely in the situation of any other carrier.[2] But the *statute* of 12 Charles II., having established a general post-office, and taken away the liberty of forwarding letters by private post,[3] it was thought, that an alteration had been made in the obligation of the *postmaster-general;* and, in the case of Lane *v.* Cotton,[4] three Judges determined, against the well supported opinion of Chief Justice Holt, that the postmaster was not answerable for the loss of a letter with exchequer bills in it; and that the postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from government. The same question was at a later period discussed in a case brought against the postmaster-general, to recover the amount of a bank note stolen by one of the sorters of letters, when the Court adhered to the doctrine of the three Judges in the above named case, against the opinion of Lord Holt.[5] Lord Mansfield, in this case, held, that there was no analogy between the postmaster and a common carrier; because, the postmaster has no hire, enters into no contract, and carries on no merchandise or commerce; the post-office is a branch of revenue, and a branch of police, created by act of parliament; as a branch of revenue, there are great receipts, but there is likewise a great surplus of benefit and advantage to

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1 McGill *v.* Rowland, 3 Barr. (Penn.) R. 451.

2 Jones on Bailm. 109, 110.

3 Carth. R. 487; 12 Mod. R. 482.

4 Lane *v.* Cotton, 1 Ld. Raym. R. 546.

5 Whitfield *v.* De Spencer, Cowp. R. 754.

the public, arising from the fund; as a branch of police, it puts the whole correspondence of the country (for the exceptions are very trifling) under government, and intrusts the management and direction of it to the crown.

§ 118. In the United States, it is also held, that the postmasters are merely public officers appointed by, and responsible to, the government; that the contracts made by them officially are public contracts binding on the government, but not on themselves personally.[1]

§ 119. But a postmaster is considered to be liable in a private action for damages arising from misfeasance, or for negligence, or want of *ordinary diligence* in his office, in not safely transmitting a letter, although not liable, like a common carrier, for the safe conveyance of a letter from his post-office to another. His liability, it was considered, is more like that of a warehouseman; that is, he is liable for no other losses or injuries than those arising from ordinary neglect on his part. Therefore, where a letter, which contained bank notes, and which was mailed at a town in Ohio, and directed to the plaintiff at New Berlin, in Pennsylvania; from which, by regular course of mail, it was to be sent to the distributing office in Chambersburg; and the evidence went to show, that the letter had been purloined by an assistant in the post-office at Pittsburg; it was held, that the postmaster at Pittsburg was not liable for the loss.[2]

§ 120. A deputy postmaster, or clerk in the office, is answerable in a private suit for misconduct or negligence; as

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[1] Dunlop *v.* Munroe, 7 Cranch (U. S.) R. 242. A postmaster is not liable for money contained in a letter delivered at the post-office in his absence, and afterwards lost. Bolan *v.* Williamson, 2 Bay (S. C.) R. 551.

[2] Schroyer *v.* Lynch, 8 Watts (Penn.) R. 453.

for wrongfully detaining a letter an unreasonable time.[1] But the assistants of deputy postmasters do not stand in the situation of servants to them; and, therefore, a deputy postmaster is not liable for the act of his assistant in purloining money; unless, perhaps, he retains him, after having found him to be unfaithful.[2] The deputy is not, therefore, liable for the consequences of any losses, delinquencies, or embezzlements of his official assistants, if he exercises due care and reasonable superintendence over their official conduct, and he has no reason to suspect them of any negligence or malconduct.[3]

§ 121. It has been held, in Ohio, that a *mail contractor* is not liable to the owner of a letter containing money, transmitted by mail, and lost by the carelessness of the contractor's agents in carrying the mail; and the reasons assigned by the Court were, that a mail carrier has no contract with those who transmit articles by the public mail, and he receives no fee or reward from them; that his contract is with the government of the United States, for the performance of acts in the execution of a public function; he is remunerated by the government; and the duty he takes upon himself by the contract, he is sworn to perform. So far then, as the transmission of the mail is concerned, a mail contractor is a public agent, and, as such, only responsible.[4]

§ 122. There is another kind of property, for the carriage of which persons do not become liable as common carriers. In respect to the carriage of *slaves*, the question has more than once arisen, how far the carrier of them incurs the Common Law responsibility. In Boyce *v.* Anderson, in the

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[1] Rowning *v.* Goodchild, 3 Wils. R. 443; Stork *v.* Harris, 5 Burr. R. 2709.

[2] Schroyer *v.* Lynch, *ub. sup.*

[3] Story on Bailm. § 463.

[4] Conwell *v.* Voorhees, 13 Ohio R. 523.

Supreme Court of the United States,[1] it was held, that the law regulating the responsibility of common carriers, does not apply to the case of carrying intelligent beings, such as *negroes*. The carrier has not, and cannot have, the same absolute control over them, that he has over inanimate matter; and in the nature of things, and in their character, such human beings are passengers. Therefore the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods. In South Carolina, it has also been held, that there is a manifest distinction between the liability of the carrier with respect to the transportation of a *slave* and a *bale of goods;* and that the strictness of the Common Law rule of liability, is not, from the nature of the subject, applicable to the carriage of the former.[2] The Supreme Court of Alabama have held, on the authority of the above case of Boyce *v.* Anderson, that the strict rule of the Common Law, in respect to the responsibility of common carriers, does not apply to the conveyance of slaves as passengers, by a carrier for hire; and that for such passengers a carrier is liable only for ordinary neglect. But if slaves have paid no hire for their passage, the carrier would only be responsible in the case of gross neglect; in other words, a less degree of negligence makes a carrier liable to a passenger who has, or is bound to pay his hire, than is required to make him responsible to one, from whom he is to receive no reward.[3]

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[1] Boyce *v.* Anderson, 2 Peters (U. S.) R. 150; and see Stokes *v.* Saltonstall, 13 Ib. 181.

[2] Clark *v.* McDonald, 4 M'Cord (S. C.) R. 223.

[3] Williams *v.* Hitchcock, 4 Port. (Ala.) R. 234. The owners of a boat are not liable for the loss of a slave, employed as one of the boat hands, unless the loss was occasioned by the wilful misconduct or culpable negligence of the captain. McDaniel *v.* Emanuel, 2 Rich. (S. C.) R. 455. Where a slave was hired to work on a railroad, and the slave, with the knowledge of the conductor, went on the cars and was carried beyond the place at which his services were that day required, and in jumping from

the cars while in motion, was killed ; it was held, that the Company were liable to the owner of the slave for the loss. Duncan *v.* Railroad Company, 2 Rich. (S. C.) R. 613. It has been held in Tennessee, that where a hired slave dies, or runs away, the fact of such death, or running away being proved by the hirer, the owner must prove that negligence intervened to charge the hirer with the loss. Runyan *v.* Caldwell, 7 Humph. (Tenn.) R. 134. So in Kentucky, Hawkins *v.* Pythian, 8 Mon. (Ken.) R. 515 ; 7 Ibid. 662.

CHAPTER V.

OF THE DUTY OF A COMMON CARRIER TO RECEIVE GOODS, AND OF THEIR DELIVERY TO HIM AS THE COMMENCEMENT OF HIS RESPONSIBILITY.

§ 123. As has been already stated, a common carrier is distinguished from a private carrier, both in respect to the *duty* which the law imposes upon him, in consequence of the public employment he has voluntarily assumed, to receive goods which are offered for carriage ; and in respect to his *responsibility* for their safety, after they are in his custody.[1]

§ 124. In respect to the first mentioned distinction, the law has been lately laid down by the Supreme Court of the United States, that a common carrier " is bound to receive, and carry, all the goods offered for transportation, subject to all the responsibilities incident to his employment; and is liable to an action in case of refusal." [2] But in order to render a carrier liable in an action, for refusing to take charge of goods, there must be tendered him a *reasonable compensation*. Indeed no person is a common carrier, in the sense of the law, who is not a carrier for hire ; and it is the reward which renders him liable ; as Lord Coke says, the carrier " hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him." [3] Still, it is not required that the reward to be tendered, should be a fixed

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[1] See *ante*, § 67.

[2] New Jersey Steam Navigation Co. *v.* Merchants Bank, Dec. Term Sup. Court U. States, 1847, Appx. How. (S. C.) R. ; and see *post*, § 590, 612.

[3] Co. Litt. 89, *a*.

sum; it being sufficient, if it be in the nature of a *quantum meruit* to or for the benefit of the bailor;[1] yet if the party offering the goods, avers and proves his readiness and willingness to pay the money for the carriage, it will, it seems, be considered as equivalent to a tender.[2] Payment may also sometimes be inferred; as, in a suit against stage owners for

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[1] Rogers *v.* Head, Cro. Jac. 262. Assumpsit against a common carrier; and upon motion in arrest of judgment, for that he was not charged as a common carrier; and that the promise was not for any certain sum, but only that he would, *rationabiliter*, content him; *non alocatur*, "for the consideration is sufficient, because a carrier may demand, and the other is bound to pay, as much as is reasonable." Bastard *v.* Bastard, 2 Show. R. 81. Action against a carrier for loss of a box; upon motion in arrest of judgment, because no particular sum had been agreed upon for the carriage, but only that a reasonable reward was to be paid, held well enough; for as in such case a carrier may maintain a *quantum meruit*, he is as much liable as if there is a particular agreement for a sum certain. S. P. admitted in Lovett *v.* Hobbs, Id. 129. Boulston *v.* Sanderford, Skin. R. 279; Jackson *v.* Rogers, 2 Shower, R. 328; Riley *v.* Horne, 5 Bing. R. 217; Macklin *v.* Waterhouse, Ib. 212; Hollister *v.* Nowlen, 19 Wend. (N. Y.) R. 234; Cole *v.* Goodwin, Ib. 251; Bac. Abr. *Carriers*, B.; 2 Kent, Comm. 598; Story on Bailm. § 508. Carrier liable to be sued if he refuse to carry goods for the common reward. Hurrill *v.* Owens, 1 Dev. & Bat. (N. C.) R. 273; Anon. *v.* Jackson, 1 Hayw. (N. C.) R. 14. "It is exceedingly clear, that no person is a common carrier, in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but if something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and of course his rights, duties, and liabilities are of a very different nature and character from those of a common carrier. It is not necessary, that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the Company." Per Story, J., in Citizens Bank *v.* Nantucket Steamboat Co. 2 Story (Cir. Co.) 35.

[2] Story on Bailm. § 508; Pickwick *v.* Grand Junction Railway Co. 9 Dowl. Parl. Cases, 766. And see *post*, § 356, *et seq.* and *post*, § 418.

loss of baggage, payment of the fare need not be expressly proved, inasmuch as it may be inferred without violent implication, it being seldom if ever neglected.[1]

§ 125. Nevertheless, there may be reasonable grounds for a refusal by a carrier to take the goods, and such grounds as will, if supported, be a legal defence to an action for the non-carriage of the goods. If a carrier refuses to take charge of goods because his coach is full, it is a reasonable ground of refusal.[2] In the words of Mr. Justice Best, "he must take what is offered to him, to carry to the place, to which he undertakes to convey goods, if he has room for it in his carriage."[3] So also, if he has no convenient means of carrying the goods offered, with security;[4] or because the goods are of a nature, which will at the time expose them to extraordinary danger or popular rage;[5] or because the goods are

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[1] M'Gill *v.* Rowand, 3 Barr (Penn.) R. 451.

[2] Action against a coach-master, for refusal to carry goods; but evidence being given that the coach was full, wherefore the defendant denied to take charge of the goods; it was agreed to be a good answer; "for if an hostler refuses a guest, his house being full, and yet the party says he will shift, &c.; if he be robbed, the hostler is discharged." Lovett *v.* Hobbs, 2 Show. R. 127.

[3] Riley *v.* Horne, 5 Bing. R. 217. It is agreed, says Cowen, J., in Cole *v.* Goodwin, by all the books, that while the carrier enjoys the privileges of a common carrier, it is a duty he cannot escape in any form to receive goods, *if he has room* to carry them, for a reasonable reward; and the reasonable reward may be set down as the accustomed reward for like services. Cole *v.* Goodwin, 19 Wend. (N. Y.) R. 261, and Appx.; 9 Leigh (Va.) R. 347; Robins *ex parte*, 7 Dowl. Parl. Ca. 566.

[4] Case against a defendant, a common carrier, for refusing to carry a pack, though offered his hire; and held by the Lord Jeffries, "that the action is maintainable as well as it is against an innkeeper for refusing a guest, being tendered satisfaction for the same. Note, it was alleged and proved, that *he had convenience* to carry the same, and the plaintiff had a verdict. Jackson *v.* Rogers, 2 Shower, R. 327.

[5] Case against a common carrier for so negligently carrying wheat, that it was seized by a mob, during riots. But as the defendant had been prevailed upon to send it by a private boat, and not in his usual course of

not of a sort which he is accustomed to carry;[1] or because the goods are brought at an unreasonable time.[2] And a carrier, moreover, is not bound to receive goods, until he is ready to engage in their transit.[3]

§ 126. And it has been considered in this country, that the rule of the Common Law, that a person, who holds himself out as a common carrier, is obligated to take employment at the current price, will not apply, unless the carrier has a particular route between certain fixed termini; and that, although in England the duty of the carrier to carry at request upon a particular route, is the *criterion* of the profession, it should not be so in this country. At least it has been so considered in so far as it relates to the State of Pennsylvania. C. J. Gibson, in delivering the opinion of the Supreme Court of that State, in Gordon *v.* Hutchinson,[4] held, that rules which

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carriage, at the express request of the plaintiff, the Court held, that it was a question of fact for the jury to find, if the corn had been put on board, according to the usual course of dealing with a common carrier; and the jury having found, that it was not a transaction in the common course of trade, it was to be considered as a charge received under such circumstances, that if the defendant had been apprized of them, it is clear he would not have contracted to receive them as a common carrier; and that there was a tacit stipulation that he should not be answerable for any damage which might arise from the mob; without which no reasonable man would have undertaken for the carriage of the goods. Edwards *et al.* *v.* Sherratt, 1 East, R. 604.

[1] See *ante*, § 99 *et seq.* and *post*, § 209, *et seq.*

[2] Story on Bailm. § 508; Packard *v.* Grand Junction Railway Co. 12 M. & Welsb. R. 766; and see *post*, § 136.

[3] Ibid.; Lane *v.* Cotton, 1 Ld. Raym. R. 652; 1 Com. R. 105. In England it is considered that railway companies are not in general bound to provide means of carrying every possible description of goods, but that they have a discretionary power in this respect. The Liverpool & Manchester Co. however, constitutes an exception. See Stat. 7 Geo. 4, c. 29, s. 138, (Local and Personal.) Walf. Sum. Law of Railroads, 304.

[4] Gordon *v.* Hutchinson, 1 Watts & S. (Penn.) R. 285; and see the decision in this case, and the views of Chief Justice Gibson, more fully stated, *ante*, § 70. See also Steinman *v.* Wilkins, 7 Watts & S. (Penn. R. 466.

have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution, and no little qualification, to the business of a people whose occupations are more vague, desultory, and irregular, than is the case in an old country, and one comparatively limited in point of territory, like England. In Pennsylvania, he said, there were no carriers, exclusively between particular places, before the establishment of public lines of transportation; and, according to the English rule, there could have been no common carriers, for it was not pretended, that a wagoner could be compelled to load for any part of the continent; and nothing, he said, was more common formerly than for wagoners *to lie by*, in Philadelphia, for a rise of wages. He admitted, that the policy of holding the carrier liable as an *insurer*, was more obviously dictated by the solitary and mountainous region through which his course for the most part lay; than it is by the frequented thoroughfares of England.

§ 127. In the above case reference is made to the extraordinary risk of transporting through a region "solitary and mountainous." Now the Common Law has considered it reasonable, that the carrier should in cases of *extraordinary risk*, have the power of contracting, by special contract, upon extraordinary terms.[1] It is laid down, that if the rules of commercial law impose upon the carrier the responsibilities of an insurer, his reward ought, in every case to correspond with the greater warranty undertaken, and additional precautions necessary to be provided by him.[2] "As the law makes the carrier an insurer," says Mr. J. Best, "and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium,

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[1] Jeremy on Carr. 39, 42; Story on Bailm. § 549; *post*, Chap. VII.
[2] Jeremy *ub. sup.*; Gibbon *v.* Paynton, 4 Burr. R. 2301.

for his insurance of their delivery at the place of their destination, as for the labor and expense of carrying them there."[1] If a person send to a carrier's office to know his rate of charges, the carrier is bound by the representation there made by his clerks; and if the goods are sent upon the faith of such representation, the carrier cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake.[2]

§ 128. The compensation of companies incorporated for

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[1] Riley *v.* Horne, 5 Bing. R. 217. Where a carrier was to carry a bag of gold across Hounslow Heath, it was thought that he was justly entitled to charge a rate of remuneration proportioned to the increased risk he run by so doing. Tyler *v.* Morrice, Carth. R. 486; and see Sheldon *v.* Robinson, 7 N. Hamp. R. 157; Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 114; Hollister *v.* Nowlen, 19 Ib. 239, 241; and Appx. p. xviii.

[2] Wingfield *v.* Packington, 2 C. & Payne, R. 600. In England, a railway company, under the provisions of the act of incorporation, have a right to fix their own charges for the carriage of goods, subject only to the conditions imposed by their act. It usually forms part of these conditions that the charges shall be *reasonable* and *equal* to all persons, or equal under the like circumstances; and that no favor shall be shown thereby to one person, or description of persons at the expense of another. The criterion for determining how far a charge is reasonable or not, is to consider the trouble, expense, and responsibility attending the receipt, carriage, and delivery of the goods in question. Where these are equal, the charge should be the same; where they vary, the charge may fairly be varied in the same proportion. For instance, for small parcels more may fairly be charged by the company than a proportionate part, according to weight, of the price of larger parcels of the same commodity, by reason of the greater trouble in receiving, despatching, and delivering them, and their exposure to a much greater risk of abstraction and loss. But if a number of small parcels are united in one large package, and in that state delivered to the company, consigned to one person, the trouble and responsibility are reduced to much the same degree as if all the articles contained in the package were the property of the same owner and intended to be delivered to him, the only difference being, that in the former case — supposing a misdelivery or other conversion of the goods by the agents or servants of the company — the company would be liable to several actions of trover instead of one. Walf. Sum. Law of Railways, p. 317.

the purpose of acting as common carriers, is sometimes subject to rules imposed by the legislature; and acts of the legislature conferring privileges upon such a company, and professing to give the public certain advantages in return, are to be construed strictly against the company, and liberally in favor of the public. By the Acts of Parliament under which the Great Western Railway Company, in England, was incorporated, it was provided, that the charges for the carriage of goods should be reasonable and equal to all persons; and that no reduction or advance should be made, either directly or indirectly, in favor of, or against, any particular person. The company acted themselves as carriers *for the public*, and issued certain scales of their charges for carriage of goods, including the collection, loading, unloading, and delivery of parcels; and they also carried goods *for other carriers*, to whom they made certain allowances, as an equivalent for the trouble of the collection, &c. of parcels; such collection, &c. being performed by the carriers. But in their dealings with A., a particular carrier, they refused to make such allowances, but were willing to perform for him all the things which formed the consideration for such allowances, and it was held, that the charges to A. were not equal or reasonable. The company, in their transactions with the public, and with other carriers, made the following distinction as to their charges for carriage: *In the case of the public*, if there were several packages from one consignor to several consignees, or from several consignors to one consignee, the charge was upon the aggregate weight. *In the case of carriers*, if there were several packages for several consignees, the charge was upon the separate weight of each package, unless more than one package belonged to the same consignor, (not being the carrier,) or was going to the same consignee, in either of which cases the charge was upon the aggregate weight. But in such cases, the company recognized the carrier only as the consignor and consignee of the goods, the agent of such carrier, in fact, receiving the goods at the end of the transit. It was held, that the com-

pany were bound to treat a carrier as consignor and consignee, for all purposes, including the mode of charging in the aggregate. And it was also held, that A., having paid the extra charges in both of the instances above mentioned, might recover the amounts of such payments in an action for money had and received against the company; such payments not being voluntary, but made in order to induce the company to do that which they were bound to do, without requiring such payments.[1] The restriction in the charter of the Camden & Amboy Railroad Company, limiting their charge for the transportation of property, to the rate of eight cents per mile, extends and applies to the whole line of communication which they were incorporated and authorized to perfect — that is, from the city of New York to the city of Philadelphia. Or, in other words, the restriction was not intended to be applied only to the *railroad*, and to leave the company to charge at discretion on their conveyances by water.[2]

§ 129. The entire weight of the responsibility rigorously imposed by law upon a common carrier, falls upon him contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely, on delivery, carries with it a promise to *keep safely* before the goods are put *in itinere*.[3] By the ordinances of France, and of some other countries, it is provided, in cases of insurance, that if the time of the risk be not regulated by the

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[1] Parker *v.* Great Western Railway Co. 7 M. & Grang. R. 253.

[2] Camden & Amboy Railroad Co. *v.* Briggs, 1 New Jersey R. 406.

[3] Randleson *v.* Murray, 8 Adol. & Ell. R. 109; Dale *v.* Hall, 1 Wils. R. 281, also the case of Goff *v.* Clinkard there cited, in which a shipmaster was held liable for the accident, which happened *in letting down into the vessel's hold* a puncheon of rum, and all possible care was used. See also Story on Bailm. § 536; Williams *v.* Peytarin, 4 Mart. (Louis.) R. 304; McHenry *v.* Railroad Cor. 4 Harring. (Del.) R. 448. Blanchard *v.* Isaacs, 3 Barb. (N. Y.) R. 389.

contract, it shall commence, as to the goods, from the time they are put on board the vessel, or put into barges to be conveyed on board; or, in other words, from the moment they leave the shore; and the reason assigned for this regulation, is, because the perils of the sea commence from the moment the goods are on the water.[1] The same doctrine is recognized and applied in this country,[2] and it properly applies to common carriers. In an action against the master of a ship for goods delivered into his custody, which were stolen from the ship by persons pretending to be officers with a warrant to search, he was held answerable for the value; for he had been used to receive the freight, and to make contracts for the transporting of goods.[3] Where it was proved, that by the established usage the goods were delivered by a wharfinger to the mate and crew of the vessel which was to carry them, Lord Ellenborough said, "Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; the mate is such a recognized officer on board the ship, that delivering to him is a good delivery; if the jury believe, that the mate received the goods, they are therefore in his care; and if they were once well delivered to the mate, their being *lost on the wharf* cannot affect the wharfinger."[4] It is in many cases the usage of the masters and owners of ships to receive goods at the wharf or quay or in their boats, or at the warehouse of the shipper or his agent; or to take them at other special places, into the custody of the proper officer of the ship; and in all such cases, their liability as carriers commences, at the instant of such acceptance of the goods.[5]

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[1] Marsh. on Ins. p. 162.

[2] Martin *v.* Salem Marine Ins. Co. 2 Mass. R. 420.

[3] Mors *v.* Slue, Sir T. Raym. R. 220, but more correctly reported in 1 Ventris, R. 190 and 238, and recognized in 2 Ld. Raym. R. 919.

[4] Cobham *v.* Downe, 5 Esp. R. 41. As soon as the goods are delivered on board, the owners become insurers for all but the excepted cases. Faulkner *v.* Wright, 1 Rice (S. C.) R. 107.

[5] Story on Bailm. § 534; Abbott on Shipp. Pt. 3, ch. 3, § 3; Fregans *v.* Long, 4 B. & Cress. R. 219.

§ 130. A ferryman is liable as a common carrier, it has been held, for the safety of a carriage as soon as it is fairly on the slip or drop of the flat, though driven by the servant, or owner of the carriage, as it is then, with the horses, in the ferryman's possession; ferrymen must have their flats so made that all drivers, with horses and carriages, may safely enter thereon, and if in making the attempt to enter, the property is lost or injured, the ferryman is liable.[1] It was contended, on one occasion, that so far as relates to the transportation of carriages and horses, a ferryman ought not to be liable, on the ground, that they were only the *appendages of the persons*, and that the carriers of persons are not liable for their appendages. To support which, it was shown, that if a passenger in a stage coach lose his watch, or a lady her ring or shawl, the stage coachman is not liable. But it was considered by the Court to be clear, that a ring is not like a carriage, and still more clear, that where there is *no undertaking* to carry, there can be *no delivery*, and consequently no responsibility for the loss.[2]

§ 131. A person who is a common carrier, may at the same time be a warehouseman, and after he receives the goods, and before they are put *in itinere*, they may be lost or injured. In such case, if the deposit in the warehouse is a mere accessary to the carriage, or in other words, if the goods are deposited for the purpose of being carried, such person's responsibility, as a common carrier, begins with the receipt of the goods.[3] That is, he then becomes responsible for all losses not occasioned by inevitable casualty; whereas, if he were a mere warehouseman, he is not liable, unless he has been guilty of ordinary neglect.[4]

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1 Miles *v.* James, 1 M'Cord (S. C.) R. 457.

2 Cohen *v.* Hume, McCord, (S. C.) R. 439.

3 See *ante*, § 75.

4 Forward *v.* Pittard, 1 T. R. 27; and see *ante*, § 75.

§ 132. If a wharfinger undertakes to convey goods from his wharf to the vessel for which they are destined, *in his own lighter*, his liability is similar to that of a carrier. An action was brought, in which the defendant was both a wharfinger and a lighterman, for the loss of goods, which, while upon the defendant's premises, were destroyed by fire; and the question being, whether the defendant, whose duty it was to convey the goods from the wharf in his own lighter to the vessel in the river, was liable for the loss. Lord Ellenborough was of the opinion, that the liability of the wharfinger, while he had possession of the goods, was similar to that of a carrier.[1]

§ 133. An innkeeper, likewise, if he is at the same time a common carrier, is liable, as such, for any loss to goods sent to his inn, (and received there to be forwarded,) which happens before they are put in transit. It is common in London, that the innkeeper has some concern in the coaches and wagons which put up at his house; and in those cases he is held liable as a carrier, whenever goods are delivered at the inn for carriage.[2]

§ 134. But if a person is at the same time a common carrier, warehouseman, and forwarding merchant, and he receives goods into his warehouse to be forwarded, *but not until he shall have received orders from the owners*, the delivery to him is not as a common carrier, but only as a warehouseman; and consequently he is only answerable in the latter capacity, if the goods are destroyed while in the warehouse by fire, and before such orders have been received.[3]

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[1] Maving *v.* Todd, 1 Stark. R. 72.

[2] Per Buller, J., in Hyde *v.* Trent and Mersey Nav. Co. 5 T. R. 389.

[3] Platt *v.* Hibbard, 7 Cowen (N. Y.) R. 497; Ackley *v.* Kellogg, 8 Ib. 223; Roskell *v.* Waterhouse, 2 Stark. R. 461; and *ante*, § 75.

§ 135. If the carrier directs that goods should be sent to a particular booking-office, he is answerable for the negligence of his booking-office keeper.[1] In Camden and Amboy Railroad Company *v.* Belknap, (which was error from the Superior Court of the City of New York,) Belknap brought an action on the case against the said company, as common carriers between New York and Philadelphia, for the loss of his baggage; and the facts were, that the company, in the conducting of their business, kept two offices in New York, in one of which they were *in the habit* of receiving, and (if requested) of locking up the baggage of persons intending to go on in the next boat that should depart. Belknap, intending to proceed on his journey by the next boat, left his baggage at this office, where it was received by the agent of the company; and it was lost before the departure of the next boat. Bronson, J., who gave the opinion of the Court, considered it quite clear, upon this statement, that Belknap's trunks were in the possession of the company *as common carriers*, and that they were answerable, in that character, for the safe keeping of the property; and that their liability existed independent of any other contract, express or implied, for the safe keeping of the property, and without regard to any question of negligence; and that the Judge would have been well warranted in instructing the jury that Belknap was entitled to their verdict.[2]

§ 136. It is by no means necessary to a delivery, that merchandise should be entered upon any freight list, or that the contract of hire should be verified by any written memorandum.[3] It is always, however, more advisable for the owner

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1 Culpepper *v.* Good, 5 Carr. & Payne, R. 380; and see Gilbert *v.* Dale, 6 Adol. & Ell. R. 543.

2 Camden and Amboy Railroad and Transp. Co. *v.* Belknap, 21 Wend. (N. Y.) R. 354.

3 Citizens Bank *v.* Nantucket Steamboat Co., 2 Story (Cir. Co.) R. 16; and see Parker *v.* Great Western Railway Co. 7 Man. & Grang. R. 253.

of the goods, when he presents them for transportation, to have them entered on the carrier's books, and also properly marked; and if they be improperly marked, in consequence of which the carrier makes a misdelivery, the owner must bear the loss.[1]

§ 136 *a*. It is not necessary to constitute a complete delivery to the carrier, that the goods should be left at the usual place of delivery, at or before the hour appointed for receiving them, in order that they may go on the same day, *if they are received* at a later hour to be forwarded on the same day. As where a railway company published a printed notice, which was fixed over the door of their station, for the reception of goods in Liverpool, that all goods received after four o'clock, P. M., would be forwarded on the next working day. Long after the publication of this notice, certain goods were brought to the station, about half past five, P. M., to be forwarded by the railway to Birmingham. The person who brought them (a servant of the owner) saw the company's weigher, and asked him "if there was any time," that is, for the goods to proceed that evening. The weigher saying there was, the goods were placed, by the company's porters, on the trucks on which goods are carried upon the railway. The same person had, on former occasions, taken goods of the same kind to the station at a later hour, which never had been refused for being too late, and which had been forwarded the same evening. Upon these facts it was held, that there was evidence to go to the jury of a special contract by the railway to forward the goods in question on the same evening on which they were delivered.[2]

§ 137. Delivery may also be made at a different place, as well as at a different hour from the one established by notice or usage. If a package is received by the agent of a

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[1] The Huntress, Daveis, Dist. Co. R. 83.
Pickford *v.* Grand Junction Railway Co. 12 M. & Welsb. R. 766.

common carrier for transportation at his suggestion, at a place other than the office of the carrier, and is entered on the way bill, the carrier will be held answerable. As where a package was delivered to the agent of a stage-coach company at the post-office, where the stage was standing, (and not at the office of the company,) to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the way-bill, he having previously directed the person to bring it to the post-office, and the package being lost before reaching Hartford; the Court held, that the assent of the defendants, that it should be left at the post-office, the receipt of it by the agent, and the entry of it upon the way-bill, took away what force that might otherwise have been in the objection, that the package was not left at the office or place of business of the defendants.[1]

§ 138. Where the plaintiff sent an agent to the carrier's booking-office, and the agent desired a man to be sent to his (the agent's) house, to fetch a package, and it was brought by one of the carrier's men from the agent's house to the booking-office, it was held a delivery by the plaintiff to the carrier.[2]

§ 139. If a message be left at the booking-office of a carrier from N. to L., for his van to call for the plaintiff's luggage, at another inn, for the purpose of its being carried to L., and the carrier's servant and van go to the other inn, and the plaintiff's luggage be there put into the carrier's van, it is a delivery to the carrier; and if the luggage is lost from the van, the carrier is as much liable for the loss, as he would be if the luggage and the plaintiff had been taken to the defendant's regular booking-office.[3]

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1 Phillips *v.* Earle, 8 Pick. (Mass.) R. 182.
2 34 Eng. Com. Law Rep. 429.
3 Davy *v.* Mason, 1 C. & Marsh, R. 45.

§ 140. The responsibility of a common carrier, therefore, is fixed by the acceptance of the goods, whether the acceptance be in a special manner, or according to the usage of his business.[1] But an acceptance in some way is indispensable; for if it appears that there is no intention to trust the carrier with the custody of the goods, he will not be held liable.[2] If they are placed in the carrier's cart or coach, without the knowledge and acceptance of the carrier, his servants, or agents, there has been indeed no bailment of them to the carrier, and of course he cannot be responsible for the loss of them.[3] If a passenger travelling on the outside of a stage-coach, keeps a parcel or package in his own hands and under his own care; or takes his baggage with him into the interior of the vehicle, professing to watch and take care of it himself, and the thing is lost; the carrier is not responsible for it, because it was never delivered to him, or his servants, or in any way intrusted to his or their custody.[4] Where an action was brought against a railroad company for the loss of an *overcoat* belonging to a passenger, it appearing that the garment was not delivered to the custody of the defendants, but that the passenger, having placed it on the seat of the car on which he sat, forgot to take it with him when he left, and it was afterwards stolen; the defendants were not held liable.[5] *A fortiori*, a garment on the person of a passenger, as a *shawl* upon a lady, will be regarded as entirely within the possession and custody of the wearer, and the carrier will, therefore, be held not liable for the same in case it is lost or stolen.[6]

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[1] Story on Bailm. § 533; 2 Kent, Comm. 598; Harris *v.* Packwood, 3 Taunt. R. 264; Boehm *v.* Combe, 2 M. & Selw. R. 172.

[2] Brind *v.* Dale, 8 C. & Payne, R. 207; and see *ante*, § 76, 77, 82, 85.

[3] Lovett *v.* Hobbs, 2 Show. R. 127; Leigh *v.* Smith, 1 C. & Payne, R. 640.

[4] Ad. on Contr. citing Boys *v.* Pink, 8 C. & Payne, R. 361; Syms *v.* Chaplin, 5 Adol. & Ell. R. 634.

[5] Tower *v.* Utica and Schenectady Railroad Co. 7 Hill (N. Y.) R. 47.

[6] See the opinion of Colcock, J., in Cohen *v.* Hume, 1 McCord, (S. C.) R. 439.

§ 141. In the case of Miles *v.* Cattle,[1] the plaintiff received a parcel from G. to book for London, at the office of the defendant as a common carrier, but instead of obeying that instruction, *put the parcel into his own bag*, intending to take it to London himself. The defendants having lost the bag, it was held, that the plaintiff could not recover damages in respect of the parcel. Tindal, J. said, the plaintiff, in violation of his trust, thought proper not to deliver the parcel to the defendant, but to deposit it in his own bag; thereby depriving the owner of any remedy he might have had against the defendant, and the defendant of the sum he would otherwise have earned for the carriage of the parcel. Likewise in the case of the Orange County Bank *v.* Brown,[2] the president of the bank directed one P., who was going by steamboat from New York to Newburgh, to commit certain packages of money, amounting to a large sum, directly to the captain of the boat. P., not having followed such direction, the captain was not enabled to charge a reward for the carriage of the same, and neither the captain nor the defendants became responsible for its safety; and it was accordingly held, that the omission of P. to follow the directions, was a violation of his trust, and that there was no delivery to the defendants, by virtue of which they became accountable.

§ 142. Another case of non-acceptance by the carrier, in consequence of a want of trust and confidence in the carrier, is the case of the East India Company *v.* Pullen.[3] This was an action against a common *lighterman* on the Thames, in which it was held by C. J. Raymond, "that the usage of the company to place an officer, called a guardian, in the

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1 Miles *v.* Cattle, 6 Bing. R. 743.

2 Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 85. And see as to baggage of passengers, *ante*, § 113.

3 East India Company *v.* Pullen, 1 Stra. R. 690.

lighter, altered it from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself;" he thought the action, therefore, not maintainable. But the mere fact, that the owner or his servant goes with the goods, and not excluding the carrier from the custody, will not release the carrier from his responsibility arising in consequence of his acceptance of the goods, in the usual course of business.[1]

§ 143. Indeed, in deciding upon the circumstances of a particular case, whether there has been an actual delivery or not, or such an one as fixes the responsibility peculiar to a common carrier, is often a matter of great nicety. Where goods were delivered at a wharf to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents, this was held, by Lord Ellenborough, not to be a sufficient delivery to charge him, either as wharfinger, or as a carrier, with the custody of the goods.[2]

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[1] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 418; and Cole *v.* Goodwin, 19 Wend. (N. Y.) R. 251; both cases cited *ante*, § 113.

[2] Buckman *v.* Levi, 3 Camp. R. 414. This was an action for goods sold and delivered. The goods (chairs) had been sent (as at other times) to a wharf, and such had been sometimes booked, sometimes not. The plaintiff's servant took them to the wharf, and left them on the premises there piled up among the goods, with a direction to the defendant, but had no receipt for them, nor was any entry respecting them made in the wharfinger's books; he had no conversation with the wharfinger, or any other person upon the premises, but only saw a person on the wharf, whom he believed to be a servant of the wharfinger. Lord Ellenborough; "A due delivery of goods to a carrier or wharfinger, with due care or diligence, is sufficient to charge the purchaser. Before the purchaser can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked, and no person belonging to the wharf is fixed with a privity of their being left there; the defendant therefore is not furnished with a remedy over against the wharfinger, and is not himself liable as purchaser of the goods."

Where goods were left in the yard of an inn, at which the carrier and other carriers put up, but no actual delivery to the carrier or his servant was proved, it was held to be no delivery to the custody of the carrier;[1] although the carrier is liable if the goods are lost after they get into the hands of the innkeeper, if delivered with the express or implied consent, and as the servant, of the carrier.[2]

§ 144. A person sent a parcel directed to another person in London, to the postmaster of B., to be forwarded to M. The postmaster received 2*d.* to book the parcel, and sent it by a mail cart to the King's Arms inn, at M. He was accustomed so to take in parcels for the mail cart. The innkeeper, at M., booked the parcel for London, charging 2*d.* as "booking" for his own trouble, and also charging on the parcel the demand for carriage from B., which he had paid. He forwarded the parcel by a mail coach (of which the defendants were proprietors) to London. Several coaches were used to stop at the King's Arms inn, and the mail coach in question pulled up there, but did not there change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach; and no regular booking-office was kept at the inn. The parcel having been lost, it was held, that the King's Arms was a receiving house of the defendants, within the carrier's act of 11 Geo. 4, and 1 Will. 4; and that the plaintiff might prop-

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[1] Selway *v.* Holloway, 1 Ld. Raym. R. 46. This case arose out of another action on a contract to pay for hops, on delivery of them to the present defendant, a common carrier, and a verdict was twice found for that plaintiff. The hops had been lodged in the inn-yard, and no acknowledgment was shown of their receipt by any servant of the defendant; but it was proved that there were many other carriers who used the same inn. And the Court said, "they were all of opinion that the hops could not be said to be delivered to Holloway."

[2] Per Buller, J., in Hyde *v.* Trent and Mersey Navigation Co. 5 T. R. 397; Davy *v.* Mason, 1 C. & Marsh, R. 45.

erly sue the defendants on a contract to carry from M. to London.[1]

§ 145. The question arose in the State of New York — what will constitute a delivery of goods to the master of a canal boat? — and it was held to be a sufficient delivery, if the goods intended for carriage are left by or near the boat according to the *usages of business;* yet with the qualification, that such delivery must be accompanied with *express notice* to the master. The action was an action of trover, to recover the value of a box of dry goods, alleged *to have been delivered to the defendant* as master of a canal boat, to be transported from Albany to Charlestown, in Montgomery county. It appeared, that before any goods were put on board, the plaintiff requested the defendant to receive a quantity of merchandise; that he consented, and on the 20th of November, 1824, gave a receipt for 30*s.* in full, for transporting the plaintiff's goods, described as *four* boxes of dry goods, and other articles. The bill of lading, dated November 24th, in the handwriting of the plaintiff, and subscribed by the defendant, stated *four boxes of dry goods.* On the evening of the 20th of November, the plaintiff came on board; the defendant inquired what dry goods he had, and he replied *four* boxes. He then made out the bill of lading, and delivered it to the defendant. It also appeared, that no more than *four* boxes of dry goods were actually received on board; and after being so received, on the evening of the 20th of November, the plaintiff came and inquired for his goods. He was informed of their reception, went into the room where they were, and returned, saying all was right. The defendant delivered the *four* boxes according to his contract. On the part of the plaintiff it appeared, that *five* boxes of dry goods had been deposited on the dock, near the defendant's boat on the evening of the 20th of November. A man in the boat said the defendant was not on board, and the boxes were left lying on the dock. A person

[1] Syms *v.* Chaplin, 5 Adol. & Ell. R. 634.

from the boat came, and assisted in unloading two of the *four* boxes brought by one of the cartmen. It also appeared, that it was customary for masters of canal boats to receive, on deck, goods they were to transport. That the *fifth* box was brought in the evening, and placed on the dock where the boat lay. That some person on board said it was the defendant's boat; and that more goods of the plaintiff were coming on board. By Woodworth, J., who delivered the opinion of the Court: — "Admitting that, according to the usual custom and understanding of parties, a delivery on the dock, near the boat, is a good delivery so as to charge the carrier, it must always be accompanied with express notice; otherwise he is not answerable. Has that been done in the present case? So far from it, it appears to me that in every stage of this transaction, the defendant was informed there were four boxes only. So the plaintiff declared to the defendant; such is the language of the receipt for the freight; and so is the invoice. From all this the defendant was warranted in taking on board four boxes of dry goods; and ought not to be chargeable for not taking on board the fifth box, although it might have been left on the dock. From the evidence, I think the defendant might well presume a fifth box was not intended for his boat. But whether it was or not, there was a failure on the part of the plaintiff to give the defendant information. The plaintiff was probably ignorant that there was more than four boxes. That is his misfortune; not a ground to charge the defendant, who appears to have acted with good faith; and could not know, from the instructions he had received, that any more than four boxes belonged to the plaintiff. The defendant may not have received the fifth box on board; it may, by mistake, have been put on board another boat; or perhaps stolen; but there is no presumption that the defendant ever converted it. All the facts in the case negative that presumption. I am therefore of opinion, that the plaintiff has not proved sufficient to make out a delivery of the goods."[1]

[1] Packard *v.* Getman, 6 Cow. (N. Y.) R. 757.

§ 146. A delivery to the *servant*, or *duly authorized agent*, of a common carrier, who is in the habit of receiving packages, is undoubtedly a sufficient delivery.[1] As, if the mate of a ship is a recognized officer on board, and it has been the well known usage to deliver to him, a delivery to him is a good and sufficient delivery.[2] But the drivers of wagons and of stage-coaches, carrying parcels for hire *on their own account*, and no reward therefor is to be received by the proprietors, will not, as has been seen, bind the proprietors.[3] The bailment in such case can only be considered a bailment to the driver alone, and he therefore is alone responsible for the loss.[4] A shipper contracting with the master of a steamboat, and knowing that the latter receives the goods, on his own account, as a part of his privilege, and not in his character of agent for the owners, does not render the owners liable for goods delivered by the shipper to the captain.[5] In King *v.* Lenox,[6] the ship was not a general ship, and was freighted wholly by the owner; the master had a privilege which was *known to the plaintiff*, and the plaintiff, in delivering his goods for shipment, to the master, dealt with him on his own responsibility, and not as agent for the owner. The case of Walter *v.* Brewer,[7] was in some respects the same: The defendant was owner of the ship, and *loaded her himself*, and the goods for which the plaintiff prosecuted, were delivered on board clandestinely during the temporary absence of

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[1] See *ante*, § 91, *et seq.*; Jeremy on Carr. 61; Anjou *v.* Deagle, 3 H. & Johns. (Md.) R. 206; Lloyd *v.* Barden, Co. of Appeals of S. Carolina, Law Rep. for March, 1849, p. 521.

[2] Cobham *v.* Downe, 5 Esp. R. 41.

[3] *Ante*, § 76, 77. There is no intention to confide in the proprietors, *ante*, § 140, *et seq.*

[4] Bignold *v.* Waterhouse, 1 M. & Selw. R. 259; Williams *v.* Cranston, 2 Stark. R. 48.

[5] Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327, and 6 Ib. 335; also *ante*, § 85.

[6] King *v.* Lenox, 19 Johns. (N. Y.) R. 235.

[7] Walter *v.* Brewer, 11 Mass. R. 99.

the defendant. The Court held, that as there was nothing left to the care of the master but the care of the management and navigation of the ship, and especially the ship being known not to be a freighting ship, the clandestine delivery on board was not a delivery to the defendant, and that therefore he was not responsible for the goods.

§ 146 *a*. It is very clear, that if an artiele be delivered to a servant of a carrier, it must be to such an one as is entrusted to receive goods, and not to one engaged in other duties. Therefore, where a coat was delivered to the driver of a stage-coach, by a person not a passenger, to be delivered to another, in a different plaee, and the driver refused to put it on the way-bill, saying he had no right to do so, but he would get the next agent to do it at the town of S., it was held, that there was no delivery of the coat to the coach proprietor, and that he was not responsible as common carrier for the loss thereof.[1]

§ 147. The charterer and not the general owner of a vessel, it has been seen, is the person liable for the acts of the master in the course of his employment.[2] Nothing is better settled, than that if the owners of a ship have chartered it to a third person, the captain must, for that voyage, be taken to be the agent of the latter, for goods delivered to him; and the owners cannot, *hac vice*, be made liable for his acts. Thus, in an action against the owners of a ship for not delivering goods delivered on board, it was held by Lord Kenyon, that "although the defendants were owners, yet no express contract being proved with them, and the ship having been in fact chartered for that voyage by them to other persons, those persons were for that voyage to be deemed as the owners, and the captain as *their* agent *pro hac vice;* the liability being shifted by the charter from one party to the

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[1] Blanchard *v.* Isaacs, 3 Barb. (N. Y.) R. 389.

[2] *Ante*, § 89; and *post*, § 395, *et seq.*

other." [1] A delivery to the master of a vessel under a charter, the hirer having the whole control of her, for the time, to victual and man her, and who is to pay over a portion of the net proceeds to the owner, for the use of her, was held not to render the owner of her liable to the shippers for goods delivered on board the vessel which had been embezzled, or otherwise not accounted for, by the master.[2] On the same principle it is, that the owner of a ferry is not liable for the loss of goods in crossing it, delivered to the ferryman, if the ferry be rented, and in possession of the ferryman as tenant." [3]

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[1] James *v.* Jones, 3 Esp. R. 27.

[2] Reynolds *v.* Tappan, 15 Mass. R. 370; and see Schieffelin *v.* Harvey, 6 Johns. (N. Y.) R. 170.

[3] Ladd *v.* Chotard, 1 Miner (Ala.) R. 366. And see as to Ferries, *ante*, § 82.

CHAPTER VI.

OF THE RESPONSIBILITY OF COMMON CARRIERS.

§ 148. That a common carrier is answerable, as has been already stated,[1] for all losses which do not fall within the excepted cases of the "act of God" and "the king's (public) enemies," has been the settled law of England for ages.[2] The policy of imposing an extraordinary degree of responsibility upon common carriers was suggested by the edict of the Prætor in the Roman law,[3] before which carriers were not put under any peculiar obligation which did not belong to other bailees for hire. The edict referred to, did not extend in terms to carriers on land, but in most, if not in all, modern countries, the rule which it prescribes has been practically expounded, so as to include them.[4] But the rule in the Civil Law, in respect to an extraordinary responsibility, was not carried to the severe extent of the English Common Law. It did not make the carrier liable for superior or irresistible force, and it accounted *robbery* among the cases of irresistible force; and this act of violence came

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1 See *ante*, § 67.

2 2 Kent, Comm. 597; Woodleif *v.* Curteis, 1 Rol. Abr. 2 E. pl. 5; Coggs *v.* Bernard, 2 Ld. Raym R. 918; Dale *v.* Hall, 1 Wils. R. 281; Forward *v.* Pittard, 1 T. R. 27. It is a general maxim in law, that *Actus Dei nemini facit injuriam;* that is, the act of God is so treated by the law as to affect no one injuriously; Broom's Legal Max. 109. The maxim may be paraphrased and explained as follows: — It would be unreasonable that those things, which are inevitable by the act, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there was no laches. 1 Rep. 97.

3 Story on Bailm. § 458.

4 Domat, B. 1 tit. 16, § 1; Id. § 2; 1 Bell, Comm. § 398, 399, 402, 403; Ersk. Inst. B. 3, tit. 1, § 28.

within the *damnum fatale* of the Civil Law, which exempted the carrier.[1] In the modern countries governed by the Civil Law, (France, Spain, Holland, Louisiana, Scotland, and the German States,) the same rule is generally, if it is not invariably, adhered to.[2] As is stated by the learned author of "Commentaries on the Law of Bailments," the responsibility of common carriers, in the kingdoms and states just mentioned, may be summed up in the following brief statement: "They are responsible for damage caused by their servants, or by others in their employ and confidence, or under their protection; but they are not responsible for thefts committed with armed force or other superior power; and, of course, they are exempted from losses by mere accident, and inevitable casualty."[3]

§ 149. Such also seems to have been the Common Law of England, as understood in the reign of Henry VIII., in

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[1] Id. Pothier, Pand. Lib. tit. 9, n. 1, 7; Jones on Bailm. 96; 2 Kent, Comm. 598; Dig. Lib. 4, tit. 9, l. 3, § 1.

[2] Story on Bailm. § 488; 2 Kent, Comm. 598; Pardessus, Droit Comm. P. 2, tit. 7, ch. 5, art. 537–555; Code Civil of France, art. 1782, 1786, 1952; 1 Bell, Comm. p. 465, 466; Abbott on Shipp. P. 3, ch. 3, § 3, n. (1); 1 Voet ad Pand. lib. 4, tit. 9; Civil Code of Louisiana, art. 2722–2725.

[3] Story on Balm. § 488, which refers to the above authorities, and to Merlin Repertoire, *Voiture*, *Voiturier;* 2 Kent, Comm. 598; Elliott *v.* Rossell, 10 Johns. (N. Y.) R. 1. In Louisiana, where the Civil, and not the Common Law, prevails, the rule is less rigorous than the Common Law rule, so that the owners of steamboats have been held not liable in Louisiana for a loss occasioned by *fire*, where proper diligence had been used. But the jurisprudence of the States generally, contains a general adoption of the Common, in preference to the Civil Law, and such is the case in Alabama. Jones *v.* Pitcher, 3 Stew. & Port. (Ala.) R. 176, per Saffold, J. It was said by the Provincial Court of Appeals of Lower Canada, that the law creates the exception *force majeure*, or irresistible force; and that this constitutes the only difference between the law of bailments in England and in France. Hart *v.* Jones, Stuart, (Low. Canada) R. 589. See Spence *v.* Chadwick, 10 Adol. & Ell. (N. S.) 517.

which reign, says Sir William Jones, "it appears to have been generally holden, that a *common* carrier was chargeable, in case of *robbery*, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour."[1] But, says the same author, in the commercial reign of Elizabeth, it was resolved, upon the same broad principles of policy and convenience which apply with respect to innholders, "that, if a *common carrier* be *robbed* of the goods delivered to him, he shall answer for the value of them."[2] And, as before mentioned, it has long been the settled law of England, that a common carrier is responsible for all losses, except those occasioned by the *act of God* and *the king's enemies*.[3]

§ 150. The true ground of the Common Law rule just stated, Sir William Jones has observed, is the *public employment* exercised by the carrier, and the danger of his *combining with robbers*, to the infinite mischief of commerce, and extreme inconvenience to society, and not the *reward*, which is considered by Sir Edward Coke as the reason.[4] The policy of the rule of extraordinary responsibility, as before observed, was borrowed from the Roman law, but for the reason just assigned, it is applied with a stricter severity in the Common Law, than it was in that law;[5] that is, the Common Law, in fact, makes the common carrier an *insurer*, against all perils but those excepted.[6]

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1 Jones on Bailm. 103, referring to Doct. & Stud. Dial 2, ch. 38. See also Noy's Maxims, ch. 43, p. 93; Abbott on Shipp. P. 3, ch. 3, § 3, n. (1); Story on Bailm. § 489; 2 Kent, Comm. 598.

2 Jones, *sup.*; 1 Inst. 89, *a*; Woodleif *v.* Curteis, 1 Rol. Abr. 2; Proprietors of Trent Navigation *v.* Wood, 3 Esp. R. 127.

3 See authorities referred to, *ante*, § 148, note 2.

4 Jones, *sup.*

5 Story on Bailm. § 490; 2 Kent, Comm. 597, 598.

6 Forward *v.* Pittard, 4 T. R. 27; Hyde *v.* Trent and Mersey Navigation Co. 5 T. R. 189.

§ 151. Lord Holt, in the case of Coggs *v.* Bernard,[1] is very explicit in stating the Common Law doctrine which imposes upon a common carrier the extraordinary liability above mentioned, and in giving the reasons for it. "The law (says he) charges this person (the carrier,) thus intrusted to carry goods, against all events, but acts of God and enemies of the king. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons, that had any dealings with them, by combining with thieves, &c.; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded in that point."

§ 152. A learned English Judge in modern times (C. J. Best) thus supports the views advanced by Lord Holt: "When goods (he observes) are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an *insurer*. From his liability as an insurer, the

[1] Coggs v. Bernard, 2 Ld. Raym. R. 909; and Appx.

carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove, that they had happened when they had not; namely, the act of God, and the king's enemies."[1]

§ 153. The English books, it may be added, abound with strong cases, in which the above salutary rules have been enforced; and the steady and firm support, which the English Courts of Justice have uniformly and inflexibly given to them, without yielding to the hardships of the particular case, has in our country met with unqualified approbation, and declared by the best authority worthy of admiration.[2] There is indeed no doubt, but that in this country, the doctrine of the English Common Law, which declares all common carriers, whether by land or water, liable for all losses as insurers, except losses occurring from the two inevitable causes above mentioned, prevails generally as a part of the Common Law of the land.[3] Bronson, J., in delivering the opinion of the Court in Hollister *v.* Nowlen,[4] quotes the above opinions of Lord Holt, and C. J. Best, with the view of showing, that the law in relation to common carriers is simple, well defined, and, what is no less important, well understood; and in its vindication, he says:

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[1] Riley *v.* Horne, 5 Bing. R. 217. And see the Maria & Vrow Johanna, 4 Rob. R. 348. In Lane *v.* Cotton, Lord Holt says, though one may think it a hard case, that a poor carrier that is robbed on the road without any manner of default in him, should be answerable for all the goods he takes, yet the inconvenience would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party, and the law will not expose him to so great a temptation. 1 Vin. Abr. 219; and cited by Nelson, J. in Orange County Bank *v.* Brown, 9 Johns. (N. Y.) R. 114.

[2] 2 Kent, Comm. 602.

[3] Ibid. 609.

[4] Hollister *v.* Nowlen, 19 Wend. (N. Y.) R. 241, and Appx. p. xviii.

"There is less hardship in the case of the carrier than has sometimes been supposed; for, while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the Courts were now at liberty to make, instead of declaring, the law, it may well be questioned, whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact, that in Great Britain, after the Courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and restored the salutary rule of the Common Law."[1] Then there is no hardship in enforcing

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[1] The legislative interference to which the learned Judge refers, was in respect to limiting the carrier's responsibility by a general notice, as to which see *post*, Chap. VII. And see the opinion of the same learned Judge in Fairchild *v.* Slocum, 19 Wend. (N. Y.) R. 331, and in Cole *v.* Goodwin, Ib. 251; and opinion of Cowen, J., in 21 Ib. 198. The Supreme Court of Connecticut, in Crosby *v.* Fitch, (12 Conn. R. 419,) says; "We are not dissatisfied with the reasons which originated the Common Law responsibility of common carriers, and believe they apply with peculiar force at this day, and in this country." And the doctrine was sternly enforced in Connecticut, in the case of Hale *v.* New Jersey Steam Navigation Company, 15 Conn. R. 539. In Roberts *v.* Turner, Spencer, J. said, the carrier is responsible as an insurer of the goods "to prevent combinations, chicanery, and fraud." 12 Johns. (N. Y.) R. 232. Sergeant, J., in giving the opinion of the Court in Pennsylvania, says, the rule of the Common Law should not be relaxed. Harrington *v.* M'Shane, 2 Watts (Penn.) R. 443. It is a principle (that the carrier is an insurer) say the Supreme Court of Pennsylvania, "of extraordinary responsibility which has stood the test of experience, and which we are unwilling to see frittered away." Eagle *v.* White, 6 Whart. (Penn.) R. 517. In a late case in Massachusetts, Hubbard, J., in giving the opinion of the Court, remarked: — "This law (the law making a common carrier an insurer) is enforced on principles of public policy, to prevent fraud and collusion with

any contract which is voluntarily made on a valuable consideration; and the assumption of the extraordinary responsibility by the carrier is in order that he may receive the freight. "In success, he may rejoice in the fortunate results of his adventurous and hazardous undertaking; in failure, he cannot complain that he is visited with the necessary consequence of adventure — loss." [1]

§ 154. First, then, as to what is meant by the "act of God." Sir William Jones considers, that an expression more decent and proper than this, and also one more popular and perspicuous, is "inevitable accident." [2] But Lord Mansfield, in Forward *v.* Pittard,[3] considers the carrier *liable* for

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thieves and robbers; the owner of the goods, not being generally in a situation to oversee and protect his property, having placed it in the possession and under the protection of the carrier. And the pay of carriers is graduated upon such liability." Thomas *v.* Boston and Providence Railroad Corp. 10 Met. (Mass.) R. 476. See also Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 104; De Mott *v.* Laraway, 14 Ib. 225; Atwood *v.* Reliance Transportation Co. 9 Watts (Penn.) R. 87; Sheldon *v.* Robinson, 7 N. Hamp. R. 157; Hastings *v.* Pepper, 11 Pick. (Mass.) R. 42; Moses *v.* Norris, 4 N. Hamp R. 306; Kemp *v.* Coughtry, 11 Johns. (N. Y.) R. 109; Spencer *v.* Daggett, 2 Vt. R. 92; Allen *v.* Sewall, 2 Wend. (N. Y.) R. 327; Boyce *v.* Anderson, 2 Peters (U. S.) R. 150; Backhouse *v.* Snead, 1 Mur. (N. C.) R. 173; Walpole *v.* Bridges, 5 Blackf. (Ind.) R. 173; Pomeroy *v.* Donaldson, 5 Missou. R. 36; Swindler *v.* Hilliard, 2 Rich. (S. C.) R. 286. Per Richardson, J., in delivering the opinion of the Court, in Reaves *v.* Waterman, 2 Speer (S. C.) R. 206: — "It is in vain to arrange the principles that impose such strict accountability upon common carriers." Again, "The strict accountability of common carriers has been found necessary in all commercial communities, and has been the same for centuries; I might add, a successful carrying trade depends upon it." Ibid. And see also the opinion of Richardson, J., in Steamboat Co. *v.* Bason, Harp. (S. C.) R. 264; and the opinion of Nelson, J., in New Jersey Steamboat Navigation Company *v.* Merchants Bank, Dec. Term Supreme Court U. S. 1847, Appx. p. liv.; McHenry *v.* Railroad Co. 4 Harring. (Del.) R. 448.

[1] See opinion of O'Neall, J., in Smyrl *v.* Niolen, 2 Bail. (S. C.) R. 422.

[2] Jones on Bailm. 104, 105.

[3] Forward *v.* Pittard, 1 T. R. 33.

"inevitable accident;" so that it seems, that, according to the view of that learned Judge, the words "inevitable accident," which are preferred by some to the words "act of God," because more reverent, are not adequate to express the ground of a common carrier's excuse; for accidents arising from *human* force or fraud, are sometimes "inevitable." [1] Again, in another case, Lord Mansfield says, the "act of God" is "natural necessity," and is distinct from "inevitable accident;" and as examples, he mentions "winds and storms" which arise from natural causes,[2] and a "sudden gust of wind." [3] The "act of God," therefore, in its legal sense, and as applied to common carriers, means something in opposition to the act of man, for every thing is the "act of God," that happens by his permission, every thing by his knowledge.[4] Accident produced by any physical cause, which is irresistible; such as a loss by lightning or storms, by the perils of the sea, by an inundation or earthquake, or by sudden death or illness, is mentioned by a learned author as the "act of God." [5] To prevent litigation, the law presumes against a carrier in every case, except such act as could not happen by the intervention of human means.[6]

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[1] See opinion of Cowen, J., in M'Arthur *v.* Sears, 21 Wend. (N. Y.) R. 192.

[2] Proprietors of Trent and Mersey Navigation Co. *v.* Wood. 4 Doug. R. 280; 3 Esp. R. 131.

[3] Amies *v.* Stevens, 1 Strange, R. 128.

[4] Forward *v.* Pittard, *ub. sup.*

[5] Story on Bailm. § 25, § 511. "By the act of God," say the Superior Court of Errors and Appeals of Delaware, "is meant such inevitable accident as cannot be prevented by human care, skill, or foresight; but, results from natural causes, such as lightning and tempests, floods and inundation." McHenry *v.* Railroad Co. 4 Harring. (Del.) R. 448.

[6] Jeremy on Carr. 57. In the books, under the head of "waste," an analogous distinction is to be found; if a house fall down by tempest, or be burned by lightning, it is no waste, but burning by negligence or mischance is waste. Co. Litt. 53, *a*, *b*.

§ 155. The term *vis major* (superior force) is used in the Civil Law in the same way that the words "act of God" are used in the Common Law,[1] and so also is the term *casus fortuitus*.[2] The latter term might perhaps have more properly been used by the Court in Colt *v.* M'Mechen,[3] in which the term "act of God" was applied to a sudden *failure* of the wind, whereby the vessel tacking was unable to change her tack, and so went ashore. "The sudden gust, in the case of the hoyman," said Spencer, J., alluding to the case of Amies *v.* Stevens,[4] "and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case, and in the other the wind was stayed by him.[5]

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[1] Poth. Prêt. a Usage, n. 48, 60; 2 Bouv. Law Dict. 612; M'Arthur *v.* Sears, *ub. sup.*

[2] 3 Kent, Comm. 217; Abbott on Shipp. ch. 4, § 1. That the "act of God" means natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the fault or negligence of man; Jeremy on Carr. 56; Campbell *v.* Morse, Harp. (S. C.) R. 468; Harpell *v.* Owens, 1 Dev. & Bat. (N. C.) R. 273; Robertson *v.* Kennedy, 2 Dana (Ken.) R. 430; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) R. 32; Turney *v.* Wilson, 7 Ibid. 340; Sprowl *v.* Kellar, 4 S. & Port. (Ala.) R. 382.

[3] Colt *v.* M'Mechen, 6 Johns. (N. Y.) R. 100.

[4] Amies *v.* Stevens, *ub. sup.*

[5] Mr. Wallace, in his note to Coggs *v.* Bernard, (1 Smith's Lead. Cases, p. 233, of Am. Ed. 1847,) in commenting upon the above case of Colt *v.* M'Mechen, considers, that the opinion of Mr. J. Spencer may be very fair divinity; and that upon such a theological theory of causation, every thing may be the act of God. He then proceeds further to observe: — "It is the most extraordinary version of the principle on which a common carrier is discharged from liability that the books contain, and upon the authority of later cases, may confidently be pronounced to be wrong. Kent, Ch. J., in fact substantially dissented; for while he assented to the theology of Spencer, J., that the stopping of the wind was the act of God, he thought 'there was a degree of negligence imputable to the master, in sailing so near the shore under a light variable wind, that a failure, in coming about, would cast him aground. He ought to have exercised more caution, and guarded against such a probable event,' &c.; in other

§ 156. A loss by *fire*, unless by lightning, is a loss not in opposition to the act of man, and therefore the general law is clear, that a common carrier is in all common cases an insurer against such fire.[1] In an action against a common carrier for not safely carrying and delivering goods, the goods, which were hops, were burnt whilst in a booth, under the defendant's care; and although the fire began a hundred yards distant, and without any negligence whatever being proved in the defendant, it was held, that there were certain events for which the carrier is liable, independent of his contract; a further degree of responsibility by the custom of the realm; for by the Common Law, he is in the

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words, he thought it not such an act of God as takes away the legal inference of negligence. The principle so clearly and carefully ascertained in M'Arthur *v.* Sears, (21 Wend. R. 190,) controls both this case, and Williams *v.* Grant, (1 Conn. R. 487.) The principle, that all human agency is to be excluded from creating, or entering into, the cause of mischief, in order that it may be deemed the act of God, shuts out those cases where the natural object in question is made a cause of mischief solely by the act of the captain in bringing his vessel into that particular position, where alone that natural object could cause the mischief; in the two cases in question, it was the act of the captain that imparted to the natural objects all the mischievous qualities they possessed; for rocks, shores, currents, and dying breezes, are not by their own nature and inherently, agents of mischief, and causes of danger, as tempests, lightning, &c. are; the danger, therefore, sprang from human agency. It may be thought, that in principle, the distinction does not amount to much, for that the carrier is always liable for his own negligence, and it is easy to see that such accidents can never prove fatal without negligence on his part. But practically the distinction is of the first importance, *because*, it affects the burden of proof; and the confusion of the distinction tends to thwart the wise provision of the Common Law, which will not allow the carrier to throw upon the employer the burden of proving or inferring negligence or defective means in the carrier, until he has shown the intervention of such an extraordinary, violent, and destructive agent, as by its very nature raises a presumption that no human means could resist its effect. Upon the whole, it would seem that the act of God signifies the *extraordinary violence of nature*."

[1] Per Dallas, C. J., in Thorogood *v.* Marsh, 1 Gow. R. 105.

nature of an insurer; and *as the fire arose from some act of man*, the carrier is liable in this case. The law presumes against the carrier, unless he shows *the injury could not happen by the intervention of man.*[1] Thus, in this case, Lord Mansfield delivered the unanimous opinion of the King's Bench in favor, it has been asserted, "of a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation in succeeding generations." [2]

§ 157. Therefore, as carriers *by water*, whether inland or foreign, are liable as common carriers in all the strictness and extent of the Common Law rule,[3] the owners of carrier vessels must be answerable for a loss by fire proceeding from any other cause than that of lightning, and whether originally commencing in their own vessel, or, according to the above case of Forward *v.* Pittard, communicated to it from another.[4] As was said by Richardson, J., in Steamboat Company *v.* Bason,[5] (*exempli gratia*,) how easy would it be to rob a steamboat, and then raise the appearance of an accidental loss by fire. The Court then in a case in Mississippi, had all sufficient ground for deciding, as they did, that a loss occasioned by accidental fire, though not arising from negligence or carelessness, was not within the exception of a loss caused by the "act of God." [6]

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[1] Forward *v.* Pittard, 1 T. R. 27. In Hyde *v.* Trent and Mersey Navigation Company, (5 T. R. 389,) common carriers from A. to B. charged and received cartage of goods to the consignee's house at B., from a warehouse there, where they usually unloaded, but which did not belong to them. It was held, that they must answer for the goods if destroyed in the warehouse by an *accidental fire*.

[2] 2 Kent, Comm. 602.

[3] *Ante*, § 79, 80, 87, 88.

[4] Abbott on Shipp. P. 4, ch. 6, p. 389; Parker *v.* Flagg, 13 Shep. (Me.) R. 181.

[5] Steamboat Company *v.* Bason, Harp. (S. C.) R. 264.

[6] Gilmore *v.* Carman, 1 Sme. & Marsh. (Mississip.) R. 279; and see Harrington *v.* M'Shane, 2 Watts (Penn.) R. 443. The Supreme Court of

§ 158. It was, however, contended in the Supreme Court of Connecticut, in the case of Hale *v.* New Jersey Steam Navigation Company, that there was no case where the liability of the carrier is extended to fire *on the high seas.* But if the principle governs such cases, then the Court thought, it is to be supposed, the reason such cases are not to be found, is, that they have not occurred, or were not contested; and if the carrier is subjected for the loss of goods burnt on land, where he was in no fault, the Court saw no reason for exempting the carrier at sea, under like circumstances. In this case, the plaintiff claimed, that on the 10th of January, 1840, the defendants, being owners of the steamboat Lexington, which had for several years been one of the line of boats transporting goods for hire from New York to Stonington and Providence, for all persons who chose to employ them, undertook to transport two carriages belonging to the plaintiff, to Boston, or to Providence, on the way to Boston; that on the night of the 10th of January, said boat, on her passage from New York, in Long Island Sound, near Huntingdon, was destroyed by fire, together with said carriages; and the plaintiff claimed to recover of the defendants, as common carriers, for the value of the carriages, upon the ground that they were not destroyed by the act of God or the public enemy. He was sustained in this ground by the Court, who held the defendants liable.[1]

Alabama have ruled, on two occasions, that acts of God, which constitute a legal excuse for the loss of, or damage to, goods, by the sinking or destruction of a steamboat, must appear to be the *immediate*, not remote cause of the loss or damage; and must be beyond the prevention or control of human prudence. Jones *v.* Pitcher, 3 Stew. & Port. (Ala.) R. 135; Sprowl *v.* Kellar, 4 Ib. 382.

[1] Hale *v.* New Jersey Steam Navigation Co. 15 Conn. R. 539. In the case of New Jersey Steam Navigation Company *v.* Merchants Bank, (Dec. Term Sup. Co. U. S. 1847, Appx.) which grew out of the loss of property by the burning of the same steam vessel, the owners of the vessel were protected by a *special contract*, which exempted them from liability except for negligence.

§ 159. In Patton *v.* Magrath, it was argued, that the navigation of steamboats being caused by fire, made them so liable to destruction by that element, that this danger ought to be classed as the act of God. But Richardson, J., in speaking for the Court, said, in reply to this argument, that "the loss by fire, which occurring in another boat, renders the owners liable, will, in like manner, make liable the owners of a steamboat propelled by fire." But he added, that the owners would not be liable if by a public notice they declared they would not be liable in such an event; or if the bill of lading expressed, that they would not be liable for accidents by fire.[1] Thus, in other words, saying, that the owners might divest themselves of their responsibility in such an event, by *special contract*, a subject which will receive attention in a subsequent chapter. In a later case, in South Carolina, which was an action for the loss by fire of a number of bales of cotton on board the defendants' boat, the Court, in giving their opinion, said, that if there is neither usage nor special contract to protect or exempt the defendants from the general liability of common carriers for such losses, then the plaintiff's case would be too plain for a difference of opinion. And the Court added, that, upon the well established principles of the law of common carriers, the defendants were liable for all such losses by fire.[2]

§ 160. The *freezing* of our canals, rivers and arms of the sea, on the other hand, is not an interposition of human agency, but is an interposition of the *vis major*, and such an one as excuses a loss arising from the delay of a common carrier by water. But the carrier is nevertheless bound to exercise ordinary forecast in anticipating the obstruction; must use the proper means to overcome it; exercise due

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[1] Patton *v.* Magrath, Dud. (S. C.) R. 159, recognized and approved in Swindler *v.* Hilliard, 2 Rich. (S. C.) R. 286.

[2] Singleton *v.* Hilliard, (Co. of Appeals of So. Car. 1847,) 1 Strob. (S. C.) R. 203.

diligence to accomplish the transportation he has undertaken as soon as the obstruction ceases to operate; and, in the mean time, must not be guilty of negligence in the care of the property;[1] nor deviate from the course of the voyage prescribed, for the reason of the obstruction by ice.[2] The owners of a vessel lying in the river undertook to carry goods from Norwich to New London, and in the passage the river was obstructed by ice, which was formed during the night next preceding the sailing of the vessel from Norwich, whereby the vessel was injured and became leaky, and the goods were spoiled. It was held, that the owners of the vessel were liable as common carriers. But, in this case negligence and insufficiency of the vessel were charged upon the defendants, and the verdict of the jury was for the plaintiff, though they were instructed by the Court, that the defendants were not liable as common carriers for injuries arising by the act of God.[3]

§ 161. In a case against a carrier for an injury done to a cargo by steam, it appeared that the steam escaped through a crack in the steam boiler, occasioned by the *frost* (the *vis major*); and the Court held, that at that season of the year, in which such injuries by frost are likely to occur, it is gross negligence in the carrier to fill up his boiler over night, without keeping up a suitable fire to prevent such accidents.[4] Here also was the "intervention of man," viz. the misconduct and negligence of the carrier.

§ 162. The defendant allowed his wagon, in which he

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[1] Bowman *v.* Teall, 23 Wend. (N. Y.) R. 306; Parsons *v.* Hardy, 14 Ib. 215; Harris *v.* Rand, 4 N. Hamp. 259; and see Wallace *v.* Vigus, 4 Blackf. (Ind.) R. 260.

[2] Hand *v.* Baynes, 4 Whart. (Penn.) R. 204; Crosby *v.* Fitch, 12 Conn. R. 410.

[3] Richards *v.* Gilbert, 5 Day (Conn.) R. 415.

[4] Siordet *v.* Hall, 4 Bing. R. 607.

was carrying goods, to stick fast in a fording creek, and the water suddenly rising, damaged the goods; and he was held liable for the damage.[1] The damage was from the act and negligence of man; and if a common carrier "goes by ways that be dangerous, he shall stand charged for his misdemeanor;" and so, "if he overcharge a horse, whereby he falleth into the water, or otherwise so that his stuff is hurt or impaired, then he shall stand charged for his misdemeanor;" and so, "if he drive by night, or in other inconvenient time."[2]

§ 163. If the goods have been wetted, destroyed, or swept away by rains and floods, the circumstances attendant thereupon must be regarded, in order to determine whether it has been occasioned by the act of God, or the act, misconduct or negligence of man. A common carrier undertook to transport, both by land and by water, a quantity of flour from Baltimore to Philadelphia, and at an intermediate part of the route the flour was put upon an elevated place on a wharf, wholly uncovered and unprotected from the weather; and while it lay there a freshet arose, by which a great part of the flour thus exposed, was swept off. In an action to recover damages, the defendants insisted, that the loss was by the act of God, and urged in their defence, their inability to procure warehouse-room for the storage of the flour, owing to the great quantity of commodities transported along the line, in consequence of the coasting trade being cut off by the public enemy. But the Court held the defendants liable for the loss so sustained, because they knew the state of public affairs, and it was in consequence of which the line of communication in question was established, and from the same cause it became unusually crowded and profitable;

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1 Campbell *v.* Morse, Harp. (S. C.) R. 468.

2 Doct. & Stud. Dial. 2, ch. 38; Noy's Maxims, ch. 43; Boyle *v.* M'Laughlin, 4 H. & Johns. (Md.) R. 291.

because the defendants knew, or were bound to know, the extent and capacity of their means of transportation, and because the sufficient capacity of their warehouses at the point where the loss happened, they undertook for and consequently insured.[1]

§ 164. A wagoner undertook to carry and deliver certain packages of merchandise which he received in Cincinnati, to a person in Crawfordsville, in Indiana, and in an action against him for an injury done to the goods, it was proved, that he left the direct and principal road from the one place to the other, taking a more circuitous one which led past his own dwelling; that after the defendant had so deviated from the usual route, he drove on to a bridge which gave way, thereby upsetting the wagon, and throwing the goods into the water, whereby they were injured. It also appeared in evidence, that the bridge was considered safe before the accident; that the road taken by the defendant was preferred by some to the more direct and more generally travelled way to Crawfordsville, but wagoners never used it. The Court held the carrier responsible for the damage, unless he stood excused on the score of inevitable accident; which, the Court said, was so far from being the case, that the accident happened *in consequence* of his own improper conduct; and a desire to go to his own house, which was his inducement to deviate, was no legal excuse for his doing so.[2] So, if a carrier takes the most dangerous of two modes of conveyance around a fall, he does so at his own risk.[3]

§ 165. Ferrymen, if they venture out at an improper season, are most unquestionably liable; but if a sudden gust of wind or storm arise, and an injury is sustained, after the

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[1] Boyle *v.* M'Laughlin, 4 H. & Johns. (Md.) R. 291.

[2] Powers *v.* Davenport, 7 Blackf. (Ind.) R. 497; and see Davis *v.* Garrett, 6 Bing. R. 716.

[3] Lawrence *v.* M'Gregor, Wright, (Ohio) R. 193.

ferryman is under way, then it is clear the law will not charge him; because man cannot always foresee storms and tempests, and guard against them.[1] The defendant kept a ferry across the Missouri river, and the plaintiff applied to cross the river. The ferry boat was brought to the bank, and fastened by a chain to a stake driven into the bank, and the driver of the plaintiff's wagon was directed to drive into the boat. The horses entered and drew in the fore wheels of the wagon; but when the hind wheels struck the boat, the stake was broken, and the boat receded from the shore, the hind wheels of the wagon being out over the end of the boat. The driver being urged thereto, by several persons on the shore, dismounted and cut his fore horses loose from the wagon, and backed the wagon out of the boat into the water. One of the hind horses was drowned, and it was held, the loss was not occasioned by the act of God. In this case, the jury found, that, by the negligence of the ferryman, he had caused the accident to happen, and that he thereby produced the state of alarm in which the driver imprudently backed his wagon into the river. The Court said, that neither the plaintiff, nor the driver of his wagon, could be supposed to have the same presence of mind on such an occasion as the ferryman.[2]

§ 166. Carriers by water have, from a very early period, been in the habit of making special acceptances of goods to be carried for hire, and guarding themselves by the bill of

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[1] Cook *v.* Gourdin, 2 N. & McCord (S. C.) R. 19.

[2] Pomeroy *v.* Donaldson, 5 Missou. R. 36. In the Year Books (22 Ass. 41,) there is the case of an action against a waterman, for overloading his boat, so that the plaintiff's horse was drowned. It was agreed, "that if he had not surcharged the boat, although the horse was drowned, no action lies, notwithstanding the assumpsit; but if he surcharged the boat, otherwise; for there is default and negligence in the party." The Court said, "it seemed, that you trespassed when you surcharged the boat, by which the horse perished." 1 Roll. Abr. 10, pl. 18.

lading, or contract of affreightment, from losses occasioned by "perils of the seas." These words certainly denote the natural accidents peculiar to that element, and from losses thereby occasioned, the common carrier by water is, and always has been, exempt, by the Common Law.[1] As if, for example, a carrier vessel is taken in tow by a ship of war, and in order to keep up she is obliged to have recourse to an extraordinary press of sail in a gale of wind, and thereby her cargo is injured, it is a loss by the perils of the sea.[2] But what is the precise import of this phrase is not perhaps exactly settled. It has been supposed, that by these words, are properly meant *no other* than inevitable perils or accidents upon that element, and that they are but commensurate with the words "acts of God."[3] But notwithstanding this opinion, the words "perils of the sea" have been held to extend to events not attributable to natural causes.[4] They have been held to include losses by pirates,[5] and also losses by collision of two vessels where no blame is imputable to the injured ship.[6] In a case arising upon a policy of insurance, wherein the loss happened by collision without any neglect or fault on the part of the ship insured, and was so specially alleged in the declaration, the underwriters

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[1] Abbott on Shipp. 5th Am. edit., p. 470; Story on Bailm. § 512. And, that the words "perils of the sea" apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man cannot foresee, nor his strength resist, see 3 Kent, Comm. 300; Blythe (Exr.) *v.* Marsh (Admr.) 1 M'Cord (S. C.) R. 360.

[2] Hagedorn *v.* Whitmore, 1 Stark. R. 157.

[3] Williams *v.* Grant, 1 Conn. R. 487; Crosby *v.* Fitch, 12 Ib. 410.

[4] Story on Bailm. § 512. See cases arising under the clause in a bill of lading "except the perils or dangers of the rivers or lakes," considered and commented upon by Cowen, J., in M'Arthur *v.* Sears, 21 Johns. (N. Y.) R. 198, 199.

[5] Abbott on Shipp. 5th Am. edit., p. 474; Story on Bailm. § 512; Pickering *v.* Barclay, 2 Roll. Abr. 248; Barton *v.* Wolliford, Comb. R. 56.

[6] Story on Bailm. § 512; Abbott on Shipp. *ub. sup.*

were held answerable, and Mansfield, C. J., said: "I do not know how to make this out not to be a peril of the sea. What drove the Margaret against the Helena (the ship insured)? the sea; what was the cause that the crew of the other ship did not prevent her from running against the Helena? their gross and culpable negligence; but still the sea did the mischief."[1] In a case in South Carolina, the Court considered, that all accidents or misfortunes to which those engaged in maritime adventures are exposed, must undoubtedly be said to arise from perils of the sea; but in modern times, it has been found convenient to distinguish the losses to which ships and goods at sea are liable, by the more immediate causes to which they may be more particularly ascribed. In this view, losses by perils of the sea are now restricted to such accidents or misfortunes only as proceed from mere *sea-damage;* that is, such as arise *ex vi divina*, from stress of weather, winds, waves, lightning, tempest, rocks, sands, &c.[2] In a case wherein it appeared,

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[1] Smith *et al. v.* Scott, 4 Taunt. R. 126. The words "perils of the sea," though generally referable to accidents peculiar to that element, are sometimes extended to a capture by pirates, or to collision of vessels when no blame attaches to either, but more especially to the one injured. Jones *v.* Pitcher, 3 Stew. & Port. (Ala.) R. 176.

[2] See Opinion of the Court in Blythe (Exr.) *v.* Marsh (Admr.) 1 M'Cord (S. C.) R. 360. In this case, two vessels, the "None-Such" and the "Planters' Friend," were passing in a narrow channel between Georgetown and Charleston, about four hundred yards across, both going the same way; the "None-Such" ahead, going at the rate of seven knots, and the "Planters' Friend" coming up full in the wind at the rate of seven knots. The captain of the "Planters' Friend" was warned of the danger, but thinking he could clear his vessel, in attempting to pass, came in contact with the "None-Such," and sunk her. In an action brought by the owner of a quantity of rice shipped on board the "None-Such," which was lost, upon a bill of lading, in the usual form, "excepting the dangers of the sea," it was held, that the collision was the result of negligence, in the management of one or both the vessels, and that the owners of the "None-Such" were in either case liable to the shipper. A collision which would excuse the carrier, must be such as could not be avoided by human prudence and skill.

that a ship was hove down on a beach within the tide-way, for the purpose of repairing, and the tide having carried away the shores, by which she was supported, her side and some of her timbers were injured, the damage was considered as having happened on the land, and hence not to be a loss by the "perils of the sea."[1]

§ 167. But the phrase "perils of the sea," whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including unavoidable accidents upon that element, must, in either case, be understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.[2] Hence it is, that if a loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill or diligence, at the time when it occurred, it is not to be deemed, in the sense of the phrase, such a loss by the "perils of the sea" as will exempt the carrier from liability; but rather a loss by the negligence of the party.[3]

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[1] Thompson *v.* Whitmore, 3 Taunt. R. 227.

[2] Opinion of Story, J., in the case of the Schooner Reeside, 2 Sumn. (Cir. Co.) R. 571; Abbott on Shipp. Pt. 3, ch. 4, § 1; 3 Kent, Comm. 216, 217; Elliott *v.* Rossell, 10 Johns. (N. Y.) R. 1.

[3] Ibid.; and Story on Bailm. § 512 *a*. Where the claim of the defendant in an action against him for an injury to the plaintiff's steamboat, was that the injury complained of was occasioned by the neglect of the officers and crew of such boat to keep up lights, according to the statute; and the Court charged the jury, that if such officers and crew were guilty of negligence, either in respect to said lights, or otherwise, to such a degree as essentially to contribute to the injury complained of, the plaintiff could not recover; it was held, after a verdict for the plaintiff, that the charge was unexceptionable. New Haven Steamboat and Transp. Comp. *v.* Vanderbilt, 16 Conn. R. 420. The charge to the Court, in this case, is very similar to the charge of the Court in the case of Sills *v.* Brown, (9 Car.

§ 168. The import of the phrase "dangers of the *river*," like that of "perils of the sea," is not, perhaps, very exactly settled; although a just understanding of the meaning and effects of the exception in a bill of lading of the "dangers of the river," is of peculiar importance in this country, as it extensively affects, for the reason of the great number and magnitude of our navigable rivers, the commercial interests and pursuits of the whole community. The point has received the particular attention of the Supreme Court of Alabama, a State than which few others afford greater facilities to inland water transportation, with its numerous navigable streams intersecting almost every county. A consequence of these facilities peculiar to the country generally, though more so in respect to some States than to others, is, that a large portion of the people, instead of providing means of their own, have adopted the practice of intrusting to public carriers an unusual proportion of products and merchandise. There seems to be no disposition in the Supreme Court of Alabama,[1] to make any distinction between

& Payne, 661,) in which Coleridge, J., told the jury, that "if the plaintiff's servants substantially contributed to the injury, by their improper or negligent conduct, the defendant would be entitled to their verdict; but if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to their verdict." The principle involved in both cases, is, that while, on the one hand, a party shall not recover damages for an injury which he has brought upon himself, neither shall he be permitted to shield himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then, it would seem, a party is bound to use common and ordinary caution to be in the right. Per Hinman, J., in New Haven Steamboat &c. Co., *ub. sup.* The question of fair or improper conduct in these cases, is left to the determination of the jury. 2 Greenl. Ev. § 220; Williams *v.* Holland, 6 C. & Pa. R. 23; Batson *v.* Donovan, 4 B. & Ald. R. 21; Pluckwell *v.* Wilson, 5 C. & Pa. R. 375.

[1] Jones *v.* Pitcher, 3 Stew. & Port. (Ala.) R. 135, 176; and see Whitesides *v.* Russell, 8 Watts & S. (Penn.) R. 44; M'Gregor *v.* Kilgore, 6 Ohio R. 143; Dunseth *v.* Wade, 2 Scamm. (Ill.) R. 285.

"dangers of the *river*" and "dangers of the *sea*;" and in the case referred to, the Court considered, that "the perils of the sea, and of the river," are so nearly allied, that they may be considered the same, except in the few instances, in which the reason differs. That there is a settled distinction between perils of the "navigation" and the "act of God," in bills of lading, is considered to be settled, and that the bill of lading may, in transportation by water, introduce exceptions not existing by the Common Law,[1] which seems to be asserted in Aymar *v.* Astor.[2] In Johnson *v.* Friar,[3] it was held, that the expression "dangers of the river excepted," in bills of lading, meant only such as no human skill or foresight could have guarded against. In other words, it means all unavoidable accidents, for which common carriers by the general law are not excused, unless they arise from the "act of God." The distinction in Gordon *v.* Buchanan,[4] is expressly taken, for in that case it is said, that the act of God "means disasters with which the agency of man has nothing to do, such as lightning, tempests and the like." The "perils of the river" includes something more: "Many disasters which would not come within the definition of the act of God, would fall within the exception in this receipt. Such, for instance, as losses occasioned by hidden obstructions in the river newly placed there, and of a character, that human skill or foresight could not have discovered and avoided." In Williams *v.* Branson,[5] it is held, that the

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[1] By Mr. Wallace, in his note to the case of Coggs *v.* Bernard, 1 Smith's Lead. Cas. (Am. edit. 1847) p. 232.

[2] Aymar *v.* Astor, 6 Cow. (N. Y.) R. 266; and see *post*, Ch. VII.

[3] Johnson *v.* Friar, 4 Yerg. (Tenn.) R. 48.

[4] Gordon *v.* Buchanan, 5 Yerg. (Tenn.) R. 72. See also this case, and the one preceding it, confirmed in Turney *v.* Wilson, 7 Yerg. (Tenn.) R. 340.

[5] Williams *v.* Branson, 1 Murph. (N. C.) R. 417. In Marsh *v.* Blythe, 1 N. & M'Cord (S. C.) R. 170, the point is the same; the meaning of the act of God was not in question, and the point decided was, that to determine whether the cause of the loss was by a "peril of the sea," the existence or non-existence of negligence was to be tried by the jury.

exception of "dangers of the river" in the bill of lading, "signify the natural accidents incident to the navigation, not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment;" and that to ascertain whether the loss was by such "dangers," it must be inquired whether the accident arose through want of proper foresight and prudence. If a steamboat on the Ohio River run upon a stone and knock a hole in her bottom, the carrier will not be discharged from liability by virtue of the clause in his bill of lading, "the dangers of the river only excepted;" but, in order to relieve himself from responsibility, it is incumbent upon him to prove, that due diligence and proper skill were used to avoid the accident, and that it was unavoidable.[1]

§ 169. The decision in Dale *v.* Hall[2] has been considered to furnish a good illustration of the general principle by which the master and owners of a vessel are held responsible for every injury occurring to a vessel that might have been prevented by human foresight or care;[3] and that by a "peril of the sea" is meant a natural, and not merely an inevitable accident. Though the question presented in this case may seem ludicrous, yet the extent of actual injury, and the importance of the legal principle involved, have rendered it one of very considerable discussion. The question was, whether a damage done to a ship by *rats*, was among the casualties comprehended under the general phrase "perils of the seas." The decision was made as long since as the year 1750 (24 Geo. II.) and is stated, and briefly commented on, in the following manner, by Sir William Jones:[4] "In a recent case," says he, "of an action against a carrier, it was holden to be no excuse that the ship was

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1 Whitesides *v.* Russell, 8 Watts & S. (Penn.) R. 44.

2 Dale *v.* Hall, 1 Wils. R. 281.

3 Abbott on Shipp. p. 371; and see also 3 Kent, Comm. 300.

4 Jones on Bailm. 105.

tight when the goods were placed on board, but that a *rat*, by gnawing out the oakum, had made a small hole, through which the water had gushed." He then adds, that the true reason of the decision is not mentioned by the reporter; it was, says he, in fact, at least *ordinary negligence* to let a rat do such mischief in the vessel; and that, on this principle, the Roman Law had decided, that "si fullo vestimenta polienda *acceperit*, eaque *mures roserint*, ex locato tenetur, quia debuit *ab hac re cavere*." [1] Now it seems singular, that Sir William Jones should endeavor to explain the decision on such ground, because the defendant positively proved, that he had taken all possible care, and was guilty of no negligence; and indeed, on that very account, (it will appear on examination of the case,) the jury gave a verdict in his favor. The decision, therefore, sustains the policy of the law of common carriers, which supposes that there may be negligence, though impossible to be detected, and which renders the carrier liable, unless the loss can be clearly referred to that particular kind of peril of the sea, called the "act of God;" or "*vis major*." [2] It supports the principle, that, although ordinary care excuses a warehouseman, it is not sufficient to excuse a common carrier.[3] Lord Ellenborough treated the question, whether damage done to a vessel by rats, is a peril of the sea, as one about which he considered there was no doubt. It came before him in an

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[1] Dig. 19, 2, 13, 6.

[2] Opinion of Harper, J., in Ewart *v.* Street, 2 Bail. (S. C.) R. 161.

[3] In Cailiff *v.* Danvers, (Peake, R. 113,) which was an action against a warehouseman, for negligently keeping a quantity of ginseng which *rats* had got at and destroyed, although every precaution had been taken; Lord Kenyon said, — "that a warehouseman was only obliged to exert reasonable diligence in taking care of things deposited in his warehouse. That he was not to be considered like a carrier *as an insurer;* and that the defendant in this case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage which he could not prevent." S. C. cited in Jeremy on Carr. p. 91, note (*l*).

action on a policy of insurance, in which it appeared, that the ship was detained at an intermediate port, and that while lying there, the rats, which had increased to a great extent, eat holes in her transoms, and other parts of her bottom; in consequence of which a survey was called, when she was found so much injured, that she was unfit to proceed on her voyage. Being thereupon condemned, the plaintiff sought to recover a loss; but Lord Ellenborough was clearly of opinion, that this was not a loss within any of the perils insured against.[1]

§ 170. In Aymar *v.* Astor, in New York,[2] the latter party brought assumpsit against the former, for the value of certain bear skins shipped on board the defendant's vessel at New Orleans, for New York, but which were destroyed by rats on the voyage. By the bill of lading signed by the master, the receipt of the bear skins was acknowledged to be delivered in good order and well conditioned to the plaintiff in New York, "*the dangers of the seas*" and of "capture" only excepted. When they were delivered in New York they were damaged by rats; and the parties went into evidence in the Court below upon the question, whether the vessel was prudently managed for the avoiding of rats, or whether the master had been negligent in that respect. The defendants offered to prove, that both at New Orleans and at New York, damage by rats was considered and treated, by the usage of trade, and merchants, as a *peril of the sea.* The Court below excluded the evidence, and the defendants excepted. The Court charged the jury that damage done by rats was not a peril by the sea, and the defendants excepted. The verdict and judgment in the Court below was for the plaintiff. Savage, C. J., said, as to the question of liability, independent of the evidence offered, the terms "perils of the sea," as used in contracts

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[1] Hunter *v.* Potts, 4 Campb. R. 203.

[2] Aymar *v.* Astor, 6 Cow. (N. Y.) R. 266.

of insurance, do not include those losses which may be prevented by proper care: and he cited the above cases of Dale *v.* Hall, and Hunter *v.* Potts. Woodworth and Sutherland, Js., upon this point agreed with the C. J., but differed from him by their agreeing with the Court below, that evidence of mercantile usage and understanding at New Orleans and New York, that injuries by rats are considered and treated as "perils of the sea," was inadmissible.[1] The case of Garrigues *v.* Coxe, in Pennsylvania,[2] which was on a policy of insurance, the destruction of goods at sea by rats was held, on the other hand, to be a loss by a peril of the sea, where there had been no default of the carrier; but this has been considered and pronounced to be the only case contrary to the doctrine, as above established as the Common Law doctrine, that the damage so occasioned is not a damage by a peril of the sea.[3] As was

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[1] The judgment was reversed, on the ground, that the Court erred in charging the jury, that the defendants below were common carriers. That this ground is opposed to general authority, see *ante*, § 80.

[2] Garrigues *v.* Coxe, 1 Binn. (Penn.) R. 592.

[3] 3 Kent, Comm. p. 300, in a note to which page, it is also said, that the better opinion is, that the insurer is not liable for damage done by rats, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity; and the authorities cited by the learned author besides the above cases of Dale *v.* Hall, Hunter *v.* Potts, and Aymar *v.* Astor, are Roccus de Ass. n. 49; Cleirac sur le Guidon, c. 5, art. 8; Emerigon, tom. i. 377, who cites the Dig. 19, 2, 13, 6; and Casaregis, Straccha, Huricke, and Targa, may all be considered, says Kent, as maintaining the principle, that the owner and not the insurer is holden for an injury done by rats. Story refers to writers upon the foreign maritime law, who lay it down, that if the master of a vessel has used all reasonable precaution to prevent such a loss, as by having a *cat* on board, the loss is by a peril of the sea or inevitable accident; and he cites Roccus de Navibus, n. 58; Id. De Ass. n. 49; 1 Emerig. Ass. 377, 378; and see Marsh. on Ins. B. 1, ch. 7, § 3, 4; and Abbott on Shipp. p. 371; Story on Bailm. § 513; but this learned author considers, that a loss occasioned by leakage in a vessel caused by rats, is not, in the English law, deemed a loss by a peril of the sea. Id.

affirmed by Harper, J., in Ewart *v.* Street, in South Carolina,[1] in illustrating the responsibility of common carriers, "in all cases of injury to vessels from the gnawing of rats, the injury originates from causes that may be foreseen, or from the *agency of man.*"

§ 171. A very strong case, in support of the principle of law, as applied to common carriers by water, that "perils of the sea" denote natural accidents peculiar to that element, and that they should not be understood to include accidents merely because they occur upon that element, is the case of Backhouse *v.* Snead, in North Carolina:[2] A. being the owner of a vessel lately completely repaired, received corn on board on freight; the *rudder* was broken by the force of the sea, and the corn, in consequence, lost. The rudder proved to be internally rotten, although it presented an external appearance of soundness; and the fact of rottenness was unknown to A. It was held, that A. was liable for the loss of the corn. The opinion of the Court was delivered by Taylor, J., who affirmed, that all accidents which can occur by the intervention of man, however irresistible they may be, the carrier is considered as insuring against; and he relied, in support of this doctrine, upon the opinion of Lord Mansfield, in Forward *v.* Pittard, and upon that of the Court in Dale *v.* Hall.

§ 172. Where a vessel is so eaten by *worms*, as to be unfit to prosecute the voyage, it is held not to be a loss within the perils of the sea. In the case of Rohl *v.* Parr,[3] (an action on a policy of insurance,) a vessel insured to the coast of Africa, there and back, had been wholly destroyed by the worms common to the rivers of hot climates, and a total loss was demanded upon the policy. But the decision

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[1] Ewart *v.* Street, 2 Bail. (S. C.) R. 161.

[2] Backhouse *v.* Snead, 1 Murph. (N. C.) R. 173.

[3] Rohl *v.* Parr, 1 Esp. R. 445.

was against the demand, upon the ground, that the loss was like the wearing and natural decay of the vessel, and not by the perils of the sea.[1] A loss of a ship by worms in an ocean, where worms ordinarily assail and enter into the bottoms of vessels, is not a peril of the sea within a policy of insurance.[2] Where a ship sustained an injury at the Cape de Verd Islands, in the loss of her false keel, whereby she became exposed to the action of worms, which obtained entrance into her in the Pacific Ocean, and destroyed the ship, the loss does not come within the policy, it being a consequential injury. In this case, the Court held, that the master should have caused the ship to be repaired; and in not doing so, he was guilty of negligence, which exonerated the underwriters from the subsequent loss by worms, which was occasioned thereby.[3]

§ 173. In respect to *seaworthiness*, the want of which was the ground of the decisions in the cases cited in the two preceding sections, the general rule of law is well settled. It flows directly from the position, that the master and owners of a freighting ship are common carriers, that their first duty is to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage. If the shipper suffers loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to recompense.[4] It is a term of the contract on the part of the owner of any vessel or lighterman, *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and substratum

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[1] So it has in like manner been held in this country. Martin *v.* Salem Marine Ins. Co. 2 Mass. R. 420.

[2] Hazard *v.* New England Marine Ins. Co. 1 Sumn. (Cir. Co.) R. 218; S. C. 8 Peters (U. S.) R. 557.

[3] Ibid.

[4] Abbott on Shipp. 5th Am. edit. p. 417.

of the contract, that it is so; and every reason of sound policy and public convenience requires that it should be as the law presumes. In support of this doctrine, is the case of Lyon *v.* Wells,[1] in which the owner of a lighter was held liable to the full amount of damage occasioned by the leakage of his vessel. Lord Ellenborough there said: "This we consider as a personal neglect of the owner, or, more properly, as a non-performance, on his part, of what he had undertaken to do, viz. to provide a fit vessel for the purpose." In Putnam *v.* Wood,[2] the Court said: "It is the duty of the owner of a ship, when he charters her, or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety." It is, moreover, the duty of the owner to keep the vessel in that condition, unless prevented by perils of the sea; and if, during the voyage, the vessel meets with an accident arising from such cause, it is the duty of the owner to see that she is put in complete repair, at the next convenient port; for it is of the essence of the contract of the owner, that his vessel shall be able to receive, retain, and transport her cargo. These are principles which are not only applicable to contracts of affreightment, but govern in charter parties and in policies of insurance.[3] An insufficiency in the furniture of the vessel cannot easily be unknown to the master or owners; but in the body there may be latent defects unknown to both. It may be observed, however, that defects of the latter sort cannot exist, unless occasioned by age, or the particular employment of the vessel, or some accidental disaster that may have happened to it; all of which ought to be known to the owner, and ought to lead to an examination of the interior as well as the exterior parts.[4] Besides, the carrier is an *in-*

[1] Lyon *v.* Wells, 5 East, R. 428.

[2] Putnam *v.* Wood, 3 Mass. R. 481.

[3] Ibid. See also Kimball *v.* Tucker, 10 Mass. R. 192; Goodridge *v.* Lord, 10 Ib. 483; Ripley *v.* Schaife, 5 B. & Cress. R. 167; Bell *v.* Read, 4 Binn. (Penn.) R. 127.

[4] Abbott on Shipp. 5th Am. edit. p. 419.

surer against all but the excepted perils; and on this ground, if the goods are lost by any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter. Thus, in Coggs *v.* Bernard,[1] Lord Chief Justice Holt said: "The law charges the person (namely, common carrier, hoyman, master of a ship,) thus intrusted to carry goods, against all events but acts of God and the king's enemies."[2] Hence if there is a stipulation in a bill of lading, that the vessel shall be made staunch and strong, and be, in every way, fitted for the voyage, it is not so much a new engagement between the parties, as the confirmation of the obligation imposed upon all common carriers by the Common Law.[3] If, however, a vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, the carrier will not be chargeable by its being shown that a stouter vessel would have outlived the storm. This was decided in Amies *v.* Stevens,[4] in the case of a hoy, driven by a sudden gust of wind against the pier of a bridge, through which it attempted to pass, and thereby sunk, in consequence of a shock that a stronger vessel might have sustained without sinking.

§ 174. Therefore, thus far, it appears, that it is not every loss proceeding directly from *natural* causes, as winds, storms, &c., which is to be viewed as happening by the perils of the sea, or the river. But again, a common carrier, although he is not liable for the act of God, may become so

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[1] Coggs *v.* Bernard, Appx. p. i.

[2] And see Dale *v.* Hall, *ub. sup.*; Backhouse *v.* Snead, *ante*, § 171. Clark *v.* Richards, 1 Conn. R. 54; Dickinson *v.* Haslitt, 3 H. & Johns. (Md.) R. 345; Emery *v.* Hersey, 4 Greenl. (Me.) R. 407; M'Clure *v.* Hammond, 1 Bay (S. C.) R. 99; Putnam *v.* Wood, *ub. sup.*; Harrington *v.* Lyles, 2 N. & M'Cord (S. C.) R. 88.

[3] Holt on Shipp. 79; Hollingworth *v.* Brodrick, 7 Adol. & Ell. R. 40.

[4] Amies *v.* Stevens, 1 Stra. R. 128; cited in support of the proposition in the text, in Abbott on Shipp. 5th Am. edit. p. 475.

if he voluntarily and improperly encounter the mischief. Thus, if a barge-master should rashly shoot a bridge, when the bent of the weather is tempestuous, he would be chargeable on account of his temerity and imprudence; when it would be otherwise, if, using all proper precautions, he should be driven by the force of the current, or by the wind against a pier, and thereby the goods should be lost;[1] for then it would be deemed a loss by mere casualty.[2]

§ 175. It has appeared, also, that a carrier by *land* is liable for a loss happening in consequence of his *deviating* from the common and established route.[3] So, in like manner, a carrier by *water* is responsible for a loss happening by a peril of the sea, when the loss would not have thus happened, if he had not improperly encountered the mischief by deviating from the regular course of the voyage. As, in a case where the defendant received on board his barge certain *lime* to be conveyed for the plaintiff from Burly Cliff to London. The master deviated from the usual and customary voyage without any justifiable cause, and whilst the barge was so out of her course, she encountered a storm, and the sea communicating with the lime, caused it to ignite, whereby the barge and cargo were lost. In an action on the case for the loss of the lime, the declaration alleged, that "it was the duty of the defendant to have carried and conveyed the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay, or hindrance in the same;" and averred the loss to be by reason of the deviation and departure and delay out of such usual and customary course and passage. It was held, first, that the damage sustained

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[1] Amies *v.* Stevens, 1 Stra. 128, recognized and approved in Colt *v.* McMechen, 6 Johns. (N. Y.) R. 160. See also Elliott *v.* Rossell, 10 Johns. (N. Y.) R. 1.

[2] Story on Bailm. § 492.

[3] *Ante*, § 164.

by the plaintiff was sufficiently proximate to the wrongful act of the defendant, to form the subject of an action; secondly, that the declaration was sufficient to support a judgment for the plaintiff.[1]

§ 176. Again, where it appeared, that the regular course of vessels from New York to Norwich in Connecticut, was through Long Island Sound, both in summer and in winter, that in the year 1836, the navigation of the Sound was obstructed by the *ice*, and for a longer period than was usual, that in the month of February, during that period, a vessel bound from New York to Norwich, departed from such usual route, and performed her voyage in the open sea, on the south side of Long Island; it was held, that this was a deviation without reasonable necessity, that it, therefore, rendered the the owners of the ship liable, as common carriers, for a loss occasioned by the perils of the sea. It was urged by the counsel, that the danger, both to the vessel and cargo, from fire, thieves, &c. while lying in the port of New York, created such a necessity of sailing as justified the master in taking the outside passage. But this pretended danger, the Court considered was not peculiar to New York, and could not be esteemed imminent or uncommon; and therefore could not justify any unusual or hazardous experiment. The distinction was a very obvious one, the Court observed, between this case and one in which a vessel already on her voyage and *in transitu*, departs from the usual route, by reason of obstructions of the nature of the one in question, or of blockades, &c. In such cases, the master must act; a necessity is thrown upon him; and if he is governed by a sound discretion, he stands justified.[2]

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[1] Davis *v.* Garrett, 6 Bing. R. 716.

[2] Crosby *v.* Fitch, 12 Conn. R. 410; and see Oliver *v.* Maryland Ins. Co. 7 Cranch (U. S.) R. 497; Williams *v.* Grant, 1 Conn. R. 487; 3 Kent, Comm. 165.

§ 177. In Hand *v.* Baynes, in Pennsylvania,[1] the defendant, who was the owner of a line of vessels engaged in transporting goods from Philadelphia to Baltimore, received certain goods belonging to the plaintiff, on board of one of his vessels, and gave a receipt in the following words: — "Received on board of Hand's line for Baltimore via Chesapeake and Delaware Canal, from J. B. (the plaintiff) one hundred slaughter hides on deck, which I promise to deliver to J. D. at Baltimore, the dangers of the navigation, fire, leakage, and breakage excepted." The vessel left Philadelphia, and on arriving at the mouth of the canal, the captain was informed that the locks were out of order, and that he could not be allowed to pass through the canal. He then proceeded down the bay and out to sea, with the intention of going round to Baltimore; but, in a gale of wind, the vessel struck on a shoal, and with the cargo was totally lost. It was held, that the contract was a contract to carry the goods to Baltimore *through the canal;* and that the circumstances did not excuse the deviation from that route; that, by an alteration of the voyage, the shipper was exposed to risks which he would not have voluntarily encountered; that a voyage by sea required vessels of a different description, differently found, and differently manned; and although the shipper might have been willing to encounter the peril, in a vessel adapted to the trade, it did not follow, that he would risk his property in a vessel whose ordinary route was through the canal. When the master discovered the impediments to the prosecution of the voyage, through the route called for in the contract, his duty, the Court held, was plain; he had one of two courses to pursue; to remain in a place of safety at the mouth of the canal, or in some convenient and safe place in the neighborhood, until the obstructions were removed; or he should have returned and informed the owners and shippers, of the impracticability of proceeding through the canal. The legal effect of the contract, the

[1] Hand *v.* Baynes, 4 Whart. (Penn.) R. 204.

Court held, was an engagement to carry and deliver the goods at Baltimore in a reasonable time, and what would be a reasonable time, must be determined under all the circumstances, with a view to the condition of the canal, the season of the year, the state of the weather, and such other matters as might enter into the question. But, said the Court, where the contract is express to deliver goods in a prescribed time, no temporary obstruction, or the impossibility of complying with the engagement, arising from the condition of the locks on the canal, or any other cause, would be a defence to a suit for a failure to perform the contract. The Court were further of opinion, that the clause in the receipt, "the dangers of the navigation," did not apply to dangers caused by the canal's being, by inevitable accident, rendered impassable; and that occasional interruptions of trade arising from breaches in canals, or other accidents, are inconveniences, but in no sense could they be considered as dangers of the navigation, coming within the exception; and they said, that as the contract excepted the dangers by the navigation *on the route of the canal*, when there may be such a danger as is provided for, it would be time enough to decide when it should arise.

§ 178. So a loss occurring by a deviation, by taking an inland passage, will render the carrier liable. The steamboat of the defendants going through an inland passage, to Charleston, South Carolina, grounded from the reflux of the tide, in consequence of which she fell over, and the bilgewater rose into the cabin, and injured a box of books belonging to the plaintiff; and it was held that the defendants were liable for the loss thus occasioned.[1]

§ 179. However, although when, by a bill of lading, the goods are to be carried from one port to another, a direct voyage is *primâ facie* intended, yet this is a presumption

[1] Charleston and Columbia Steamboat Co. *v.* Bason, Harp. (S. C.) R. 262, cited in 1 Rice, Dig. 156.

which may be controlled by a usage to stop at intermediate ports, or by a personal knowledge, on the part of the shipper, that such a course is to be pursued.[1] In an action against the defendant, as the owner of a sloop, for a loss sustained by the plaintiff, in consequence of a deviation by the master, the defence was, that the sloop was a general coasting vessel from New York to Norfolk, and other places on the Chesapeake, and rivers running into that bay; that it was the usage of such vessels to take freight for several ports, stopping at the first port, and passing on to the others successively, leaving the goods taken for each, and taking in other goods; and this usage was general and public. The Court held, that the bill of lading was to be construed, like other contracts, according to the intention of the parties; that usage of trade is always presumed to be within the knowledge of the parties, and that such contracts as this are supposed to be made in reference to it. There was competent evidence of the usage in relation to vessels like the one in question, and there was also evidence that the plaintiff's agent knew of it; and, therefore, the *prima facie* intention of a direct voyage was subject to the contract which was controlled by the usage so known and established.[2]

§ 180. That the injury done to a carrier ship or goods on board, by her settling, on the ebbing of the tide, on a hard substance at the bottom of the harbor where she is properly moored, is an injury occasioned by the perils of the sea, is beyond all doubt; provided the injury does not proceed from an inherent weakness in the ship, or mere wear and tear. This principle is affirmed by Tindal, C. J., in Kingsford *v.* Marshall.[3] The case of Potter *v.* The Suffolk Insurance Company,[4] was narrowed down

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[1] Crosby *v.* Fitch, *ub. sup.*

[2] Lowry *v.* Russell, 8 Pick. (Mass.) R. 360.

[3] Kingsford *v.* Marshall, 8 Bing. R. 458.

[4] Potter *v.* Suffolk Ins. Co. 2 Sumn. (Cir. Co.) R. 197.

to the consideration, whether the loss of a vessel in that condition was from inherent weakness; and Mr. J. Story held, that if it was not from such weakness, it was occasioned by an unusual and extraordinary accident in grounding upon the ebbing of the tide, which would, he held, be a peril of the sea. If a carrier ship, in taking ground, should fall over and thereby bilge, (which would be no ordinary damage, but an unusual accident,) it would be a loss by the perils of the sea, just as much as it would be if done by striking on a hard substance.[1] The case of Fletcher *v.* Inglis,[2] did not turn upon any distinction, whether the injury was by a hard or soft bottom; but upon the point, whether it was an ordinary injury or an extraordinary accident. Cases of this sort, therefore, depend entirely upon the particular facts and circumstances attending them. Thus, in one case in South Carolina, the vessel became stranded, and the cotton which was on board was in consequence damaged, but the vessel being proved to be good and sufficiently manned, the carrier who undertook was not held liable.[3] When, in another case, in the same State, where a vessel was as safely moored in a dock as she could be at the particular season of the year, settled on the bottom which declined towards the stream, and sprung a leak, and the goods were damaged by the water in the hold being thrown forward, the case was held not to come within the exception of the act of God, or inevitable accident.[4]

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[1] Ibid.; Bishop *v.* Pentland, 7 B. & Cres. R. 219.

[2] Fletcher *v.* Inglis, 2 B. & Ald. R. 315.

[3] Barnwell *v.* Hussey, 1 S. C. Con. R. 114.

[4] Ewart *v.* Street, 2 Bail. (S. C.) R. 157. Harper, J., who delivered the opinion of the Court in this case, observed: "We might well conclude, from the evidence before us, that there was no degree of neglect in the master of the vessel; that the ship was moored, so far as could be foreseen, in the most judicious manner; and that she was staunch and seaworthy; but, we cannot be assured, that the *jury* (who had found for the plaintiffs) have found this. They may have concluded, contrary to the opinion of the witnesses, that there was mismanagement, and determined, from the fact of the ship's springing a leak, under the circumstances, that she was not seaworthy."

§ 181. A quantity of flour, on its way from Baltimore to Philadelphia, was put on board a schooner in Christiana Creek, and it was alleged, in an action against the carriers, who were common carriers between those two cities, that, at the time the vessel commenced her voyage, the tide in the creek wa unusually low, owing to the prevalence of the westerly and north-westerly winds; that after she had gone a short distance, she grounded, but was got off in safety, and then proceeded some distance further down the creek, when she again grounded, whereby some of the planks in her bottom were strained, so that she leaked and filled with water, in consequence of which a part of the flour was transshipped by another vessel; that she again, after some time, was got afloat, and proceeded to Philadelphia, where she delivered the flour which remained on board of her to the consignee, in a damaged condition. The defendants insisted they were not liable, because the *low tide* was the act of God, and *that* act occasioned the damage. The opinion of the Court was, that if the prevalence of the westerly and north-westerly winds had occasioned an uncommonly low tide in the creek, and thus, in an *extraordinary manner*, increased the perils of that navigation, the carriers were not bound, at their own risk, to encounter those new and extraordinary dangers; and that they would have been excusable in making a reasonable delay, until those additional and temporary perils had passed away. But inasmuch as they did proceed, they prosecuted the voyage at their own risk; they knew, or they took upon themselves to know, the changes in the navigation which had been thus occasioned, and they voluntarily proceeded; consequently, they moved forward at their own risk. The jury were therefore directed, that the evidence offered did not legally excuse the defendants from answering for the damage which the flour received on board the schooner, and they found for the plaintiff.[1]

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[1] Boyle *v.* M'Laughlin, 4 H. & Johns. (Md.) R. 291.

§ 182. If a carrier vessel should perish, in consequence of striking against a rock in the sea, or a snag in a river, or any natural obstruction, the circumstances under which the event has taken place must be ascertained, in order to decide whether it happened by a peril of the sea, or by the intervention of man. If the situation of the rock or snag, or other obstruction, is generally known, and the vessel is not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master;[1] but, on the other hand, if it is not generally known, and the master has a pilot, where it is usual to have one, the loss is deemed attributable to the act of God.[2] The boatmen who transport goods from the interior of South Carolina, are common carriers; and a loss it has been held, in that State, occasioned by one of the boats running on an *unknown snag*, in the usual channel of the river, is referable to the act of God, and excuses, therefore, the carrier.[3] If a shoal unexpectedly changes its bed, and a ship grounds upon it, the unknown shoal is the immediate and sole cause of the stranding.[4]

§ 183. In an action against the defendants, as common carriers, it was admitted that they undertook to transport the merchandise in question from Providence to New York, on board a vessel of about twenty tons, owned by the defendants, for hire, the danger of the seas only excepted. While the vessel was on her passage, she run against a rock in Providence River, in fair weather, and under a moderate breeze, and bilged, so that the merchandise (salt) was lost. The plaintiffs contended, and brought witnesses to prove, that the rock was well known to the people in the neighborhood, and to those concerned in the navigation of that river;

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[1] Story on Bailm. § 516; Elliott *v.* Rossell, cited *post*, § 185.

[2] Ibid.; Case of The William, 6 Rob. R. 316, cited in Story, *sup.*

[3] Smyrl *v.* Niolen, 2 Bail. (S. C.) R. 421; Faulkner *v.* Wright, 1 Rice (S. C.) R. 107, and see *post*, § 187.

[4] Per Richardson, J., in Reaves *v.* Waterman, 2 Speer (S. C.) R. 208.

that the vessel, when she run against it, was out of the channel course of navigation; that the master was not acquainted with the navigation of the river; and that it was usual to have a pilot, but that none was taken on board. The defendants, on their part, produced evidence to prove that the rock was not generally known. The defendants were held liable, because the master was ignorant of the navigation, and had no pilot on board, as was customary, and the vessel went out of the usual course. Mr. J. Gould said: "Now such a deviation would certainly have been misconduct; the alleged ignorance of the master (there being no pilot on board) would have been a species of deficiency, in the nature of the want of seaworthiness; and the want of a pilot, where one is, by common usage, employed, and the master ignorant of the navigation, is manifestly a culpable neglect."[1]

§ 184. By the foregoing cases one thing is rendered perfectly clear, viz. that the question, whether the loss of, or injury done to, goods, while being transported by the carrier, by natural causes, has followed the misconduct, negligence, or incompetence of the carrier, his servants or agents, or has been consequent upon the unseaworthiness or insufficiency of the vessel, is a question of fact, depending upon the finding of the jury upon the evidence.[2] Cases, therefore, may arise, in relation to carriers by water, as in relation to carriers by land, when a jury may be called upon to exercise very nice judgment and discrimination in weighing *opposite*

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[1] Williams *v.* Grant, 1 Conn. R. 487. For sailing down rivers, or out of harbors, a pilot must be taken on board, where, by usage or the laws of the country, a pilot is required. Abbott on Shipp. p. 344. A vessel is not seaworthy, if she proceeds without a pilot in navigating a river, where it is the custom to take on board a licensed pilot. Ib. note 1; Story's Edit. of Ib. (1846.)

[2] As to the question of negligence, &c. being for the jury, see *ante*, § 7, 11, 16, 27, 51.

testimony of witnesses; as the cases we next proceed to notice afford striking examples.

§ 185. In a case where a *scow* was employed by the defendants as common carriers, to carry the ashes of the plaintiffs from Ogdensburgh, in the State of New York, to Montreal, in Canada, the scow was lost by splitting upon a rock, on the shoals, within sight of Montreal. The master of the scow deposed, that he took a pilot at Chateaugy, whom he was informed was a good pilot; that they passed safely over the La Chine Rapids, and that the scow was proceeding, with a strong current, in a channel which the witness knew, from long experience, to be the right channel; that when so proceeding, *a sudden gust of wind* arose, and drove the scow out of the right course, the pilot calling out that they were getting out of the right channel, and urging all hands to row as hard as possible, to regain the right channel; that the witness and all hands accordingly rowed, to the utmost exertion of their strength, but in vain, as the scow was driven on the rock above mentioned, and was lost; that the scow, manned by six able-bodied boatmen, was about a mile from the rock when the pilot ordered the men to row, and that they continued to row for half an hour before the scow struck; that if the scow had been left to the winds and current, it would have been driven on the rocks and shoals, above the place where she struck; that the scow was lightened of three boat-loads, before passing the Chateaugy River, so as to satisfy the pilot. These facts were also deposed to by two of the boatmen. A witness for the plaintiffs testified, that he was standing on the dock, at Montreal, about a mile from the scow at the time she struck; that he saw her about half an hour before; that the weather was fair, the sky clear, and that there was no breeze where he was; that he saw the master about half an hour after he got ashore, who said he supposed they were safe until the pilot called out, and that the pilot attempted to go to the right of the rock, and finding he could not, endeavored to go to the left, and did not dis-

cover the rock soon enough to avoid it. Another witness said, he saw the scow strike the rock, but did not perceive any gust of wind, though there might have been a flaw of wind without his seeing it. The Judge charged the jury, that the only ground on which the defendants could be exonerated would be, that the loss was occasioned by the act of God; that the cause of the loss was a fact for the jury to determine, and he left the fact for their decision, with an opinion that the loss was not owing to the act of God, within the true meaning of the rule on the subject. The jury found a verdict for the plaintiff for the value of the ashes. Upon a motion to set aside the verdict, and for a new trial, the motion was denied. Kent, C. J., said, that the only real point in the case was the question of fact submitted to the jury, viz., whether the loss of the scow was to be attributable to that inevitable necessity, not arising from the intervention of man, which human prudence could not have avoided, and which is considered in law the act of God. There was contradictory testimony upon this point, but he thought with the Judge who tried the cause, that the weight of evidence was in favor of the conclusion drawn by the jury, and that the loss did not arise from any sudden gust of wind, but from the want of due care and skill in steering the boat down a well known and dangerous rapid; the dangers of such a rapid were at the risk of the common carrier, as much as the dangers of a broken and precipitous road. And the loss, said the learned Judge, must have arisen from some extraordinary occurrence, as winds, storms, lightnings, &c., to bring the case within the exception; and the rest of the Court concurred.[1]

§ 186. Again, in an action against the owner of a sloop, to recover from him, as a common carrier, the value of goods, shipped and lost, the defence was, that the sloop was staunch

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[1] Elliott *v.* Rossell, 10 Johns. (N. Y.) R. 1.

and well found, and that, in attempting to make Edisto Inlet, as was proper, the master, in heaving the lead, accidentally fell overboard and was drowned; the seamen were unable to navigate the vessel, and so by the act of God, she got upon the breakers, and was deserted by the crew. In behalf of the defendant, it was proved, that the master was steady and skilful, and never known to be drunk; that the sloop was, in all respects, seaworthy, and the crew sufficient. On the other hand, the plaintiff's witness (the master of a fishing smack who saw the sloop) said in effect, that he was in sight of the sloop several hours, and from her management thought the people on board drunk or fools, and that there was no difficulty in wind or weather. Another witness (mate of the fishing smack) saw the master of the sloop about daylight the morning she sailed, when he seemed intoxicated; that when they passed the sloop, he thought and said, her captain must be crazy, he had so many courses, and run so far from the buoy and marks. It was held, that the testimony did not show a loss by the act of God.[1]

§ 187. A vessel disabled by stranding may fall within the excepted perils, but still the master may be liable for negligence in not forwarding the goods on board, or such as remain on board, after the accident, to their destination. In the event mentioned, the conduct of the master or owner, therefore, becomes a subject of important consideration, and that, with the circumstances peculiar to the case, is a matter of fact to be submitted to the jury. When all reasonable efforts, in the opinion of the jury, fail to save the cargo, the ultimate loss may be fairly regarded as resulting from the *first* cause, as the *vis major;* upon the ground, that when human exertions have failed to obviate its consequences, the "act of God" may still be regarded as continuing its opera-

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[1] Ross v. Callender, 2 Speer, (S. C.) 393.

tion.[1] By the remarks of Kent, Ch. J. in Shiefflin *v.* New York Insurance Company,[2] it clearly appears, that when a vessel is detained without the fault of the master, the master ought to procure other means to send on the cargo; and this doctrine of course applies to all cases of disability and detention of vessels occasioned by the act of God.[3] In South Carolina, it has been held, that a boat lost by running on an unknown and concealed snag in the regular channel of the river, may fall within the excepted perils;[4] but it is also held, in that State, that whether the duties of the master and owners cease or not, by that catastrophe, depends on the determination of the jury. In an action of assumpsit in the Court of Appeals of South Carolina, against the defendants, owners of a steamboat, for the value of certain goods shipped by the plaintiffs, and alleged to have been lost on board the said steamboat, plying on the Pedee River, the defence set up was, that the boat sunk by running on a concealed and unknown snag, in the ordinary boat channel, when the river was fairly navigable for steamboats; and that the loss which followed, was not in consequence of any want of prudence and diligence, on the part of the master and owners. There was much testimony offered on both sides; by the defendants to sustain, and by the plaintiffs to repel the grounds of excuse set up: and, in some respects, the evidence was conflicting and contradictory. The plaintiffs insisted especially, that the defendants had been guilty of negligence after the steamer struck and went down, in not rescuing the goods and forwarding them to their destination. Upon this part of the case, the presiding Judge

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[1] Faulkner, &c. *v.* Wright, &c. 1 Rice, (S. C.) R. 107.

[2] Shiefflin *v.* New York Ins. Co. 9 Johns. (N. Y.) R. 21.

[3] See on this subject, opinion of Woodworth, J., in Treadwell *v.* Union Ins. Co. 6 Cow. (N. Y.) R. 270; Bryant *v.* Commonwealth Ins. Co. 6 Pick. (Mass.) R. 143; Cheviot *v.* Brook, 1 Johns. (N. Y.) R. 364; Manning *v.* Newnham, 2 Camp. R. 624.

[4] Smyrl *v.* Niolon, 2 Bail. (S. C.) R. 421.

charged the jury, — "that the duties of the master and owners did not cease with the catastrophe which arrested and detained the boat, whereby the cargo became damaged; but that they might be held liable for damages, arising from want of diligence and proper exertions towards saving and delivering the goods on board, and that the jury might regard, as a proper standard of such diligence, such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property, similarly situated." The jury found for the defendants, and a motion for a new trial was refused. But Richardson, J. dissented, and considered, that, under the circumstances, the case should be sent back to be reconsidered by the jury.[1] The general doctrine, however, clearly is, that, if by reason of stranding, or some other unexpected cause, it becomes impossible to convey the cargo safely to its destination in his own vessel, the master is to do what a prudent man would think most for the benefit of all concerned.[2] Transshipment to the place of destination, if it be practicable, is the first object, because that is the furtherance of the original object. If that be impossible, a return or safe deposit may be expedient,[3] and the merchant should, if possible, be consulted.[4]

§ 188. But the unambiguous terms and the universally admitted policy of the rule of responsibility of common car-

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1 Faulkner, &c. *v.* Wright, &c. *ub. sup.*

2 Smith, Mer. Law, 180.

3 Liddard *v.* Lopes, 10 East, R. 526.

4 Wilson *v.* Millar, 2 Stark. R. 1. A *sale* is the last thing the master should think of, because it can only be justified by that necessity which supersedes all human laws; if he sells without necessity, his owners, as well as himself, will be answerable to the merchant. Freeman *v.* East India Co. 5 B. & Ald. R. 617; Wilson *v.* Dickson, 2 Ib. 2. Still the master's authority extends to hypothecate, or even to sell a part of it, where it is necessary to do so for repairs, in order to the preservation of the entire venture. See case of Brig Sarah Ann, 2 Sumn. (Cir. Co.) R. 206; Brown *v.* Lull, Ib. 443.

riers, include not only damage occasioned by the act of God as operating upon, or as secondary to, the negligence or misfeasance of the carrier or his servants, but extend to the intervention of the agency of a *third person:* although, it has appeared, that there have been cases arising upon exceptions in bills of lading of "perils of the sea," where, in addition to losses by natural causes, those arising from the acts of third persons, are allowed to come within that phrase.[1] The general doctrine, that a common carrier insures against all accidents which may or can occur by the intervention of any human means, (however irresistible they may be,) has been too long established and too earnestly commended, to be now limited to his own acts.[2] The difficulty, as has very properly been observed, in receiving the immediate agency of third persons, as the act of God or a peril of the sea, in any shape, is, that it leaves open that very door for *collusion*, which has denied an excuse by reason of fire, theft, and robbery.[3] The true question would seem always to be, whether the loss is to be attributed to that inevitable necessity, (*not arising from the intervention of man,*) which no human prudence could have avoided.[4] In the case of Forward *v.*

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[1] See *ante*, § 166.

[2] See *ante*, § 151, *et seq.*

[3] Per Cowen, J., in delivering the opinion of the Court in M'Arthur *v.* Sears, 21 Wend. (N. Y.) R. 190.

[4] This rule, however apparently severe, is so established by the *policy of the law*, for the security of all persons, the necessity of whose affairs obliges them to trust those sorts of persons (common carriers) in the course of their dealings; for else these carriers might have an opportunity of ruining them by fraudulently combining with thieves, &c., and yet doing it in so clandestine a manner as might hardly be possible to be discovered. In support of the same rule of policy, "every thing is a negligence in the carrier or hoyman, &c. from the moment he receives the goods into his custody, which the law does not excuse; and to prevent collusive litigation, and the necessity of going into circumstances impossible to be unravelled, the law always presumes against the carrier, unless he shows the injury to have been done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, tempests, &c. And

Pittard,[1] which has been already referred to,[2] where a fire broke out a hundred yards from the carrier's booth, where he had placed the goods for safe custody, and they were destroyed by the fire, the carrier was held by Lord Mansfield to be liable, though the fire was without actual negligence on his part. It may be said, that fire is an inevitable accident; but looking to the policy of the law, it is not so regarded. Being by the act of man, it may be collusive, that in the confusion depredations may be committed; and as there is a possibility of the carrier being participant in the crime, the risk is on them; or, at least, the responsibility leads to a wholesome degree of care, which might otherwise be utterly unobserved.[3]

§ 189. So it has never been doubted, that the carrier is liable for the *theft* of a third person, whatever apparently may have been the care of his agent in guarding the goods stolen while in his custody.[4] Thus, if money is delivered to the master of a steamboat, who is accustomed to carry it for hire, as the agent of the owner of the vessel, and while his vessel is lying in the dock, the cabin is forcibly broken open, in the absence of him and his crew, and the money is stolen out of his trunk; the owner of the vessel, although no actual fault or fraud is imputable to the master, is answerable for the

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the reason why these acts only are held not to charge carriers, seems to be, that as they are not under the control of the contracting party, they ought not to affect the contract, inasmuch as he only engages against those events which by possibility and due diligence he may prevent. These rules, though said to be founded in custom, have yet always been considered to be of Common Law." See Jeremy on Carr. 56.

[1] Forward *v.* Pittard, 1 T. R. 27.

[2] See *ante*, § 156.

[3] See 1 Bell, Comm. 379. And see *ante*, § 157, as to loss of steamboats by fire.

[4] Coggs *v.* Bernard, Appx. p. i.; 2 Salk. R. 919; Rich *v.* Kneeland, Cro. Jac. R. 330.

loss.[1] It was indeed long ago held, in an action against the master of a ship for goods delivered into his custody, and which were stolen from the ship by persons pretending themselves to be officers with a warrant to search, that the carrier was not excused.[2] In an action on a bill of lading signed by the defendant, as master of a ship, it appeared, that the goods were shipped at Liverpool in good order, and consigned to the plaintiff. On the arrival of the ship in New York, it was found that several of the trunks had been opened, and the goods taken out; and it was admitted, that the goods had been embezzled, or otherwise lost, without any fraud on the part of the defendant. The master was, nevertheless, held to answer for the value of the lost property, in accordance with the rule, in furtherance of the general policy of the marine law, which holds the master responsible, as a common carrier, for all accidents, and *all causes* of loss, not coming within the exception in the bill of lading.[3]

§ 190. Again, where the owner of a ship received on board at New York, a quantity of goods to be carried to London, and on the arrival of the ship the goods were refused admission, being prohibited by the laws of England, and the consignee and master agreed that the goods should remain on board, and be returned to the shippers in New York, at their risk, they paying the freight from London; and an indorsement was made on the bill of lading to that effect; it was held, that the ship owner was responsible for the embezzlement of any part of the goods, between the time of their first shipment at New York, and their return there, although English custom-house officers were on board, during the time the vessel was in London, and although *they* may have embezzled the goods, and not the master, or crew,

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1 Kemp *v.* Coughtry, 11 Johns. (N. Y.) R. 107, and cited more fully *ante*, 104.

2 Mors *v.* Slue, 1 Ventr. R. 190, 238, and cited *ante*, § 129.

3 Watkinson *v.* Laughton, 8 Johns. (N. Y.) R. 213.

or any person within their knowledge. The master's duty was to guard against such accidents, and his neglect to do it, or his misfortune in not detecting the theft, throws upon him the loss, because it was a risk he had assumed; and to admit the latter excuse by the master, would be opening, in the opinion of the Court, "all the evils to be apprehended from fraudulent combinations and collusions between the master and the crew, and other persons, which it was the policy of the law to prevent." [1]

§ 191. Indeed, not only so, but the carrier is even answerable for the *irresistible* force and violence of *robbers* and *mobs*.[2] Though the force, says Lord Holt, in Coggs *v.* Bernard,[3] "be never so great, as if an irresistible multitude of persons should rob him (the carrier,) he is nevertheless chargeable." Lord Mansfield, in Forward *v.* Pittard,[4] puts the case of the riot in London, of 1780, by which the great destruction of property in that city could not be prevented by a considerable military force, as even an instance which could not be received to protect, in that capacity, a common carrier. It was held by the same learned Judge, that the master of a ship on board of which goods have been laden, in the river Thames for a foreign port, is liable for the loss of the goods occasioned by a forcible robbery while the ship is lying in the river. "At first," said he, in giving judgment, "the rule appears to be hard, but it is settled on principles of policy, and when once established, every man contracts with reference to it, and there is no hardship at all." [5]

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[1] Shieffelin *v.* Harvey, 6 Johns. (N. Y.) R. 170. This case is distinguishable from cases where it has been held, that during the period of detention by captors, as *prize*, or by the belligerent, for adjudication, all the responsibilities of the master and crew are suspended. And see Evans *v.* Hutton, 5 Scott, N. R. 670.

[2] See *ante*, § 149.

[3] Coggs *v.* Bernard, Appx. p. i.; 2 Salk. R. 919.

[4] Forward *v.* Pittard, 1 T. R. 27.

[5] Barclay *v.* Y. Gana, 3 Doug. R. 389, cited 1 T. R. 33, nomine Barclay *v.* Heygena.

§ 192. That the doctrine which imposes the liability of common carriers, where the loss of goods is occasioned by human agency, whether it be that of the carrier or his servants alone, or the immediate agency of third persons, applies as well to carriers by water, both inland and foreign, as to carriers by land,[1] we may instance the case of the *defective rudder*, to which attention has been already called: A man hires his vessel to be repaired by a skilful workman, who makes a rudder apparently sound, but which is internally rotten, and a loss happens by reason of its breaking by the force of the sea, the owner is liable, although he was ignorant of the defect.[2] It follows, indeed, directly from the position, that the master and owner of a general freighting ship are common carriers, that if there should prove to be a latent defect in a vessel, and one undiscoverable upon examination, (and it may be the fault of the builder,) that the owner of the vessel must answer for the damage occasioned by the defect.[3]

§ 193. The doctrine is distinctly laid down by Lord Tenterden, that in considering whether a common carrier by water is chargeable with any particular loss, the question is not whether the loss happened by reason of the negligence of persons employed in the conveyance of the goods; but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular contract of the parties, afford an excuse.[4] In support of his position, the learned author has cited the case of Gosling *v.* Higgins, in which it was held, that the master and owner of

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[1] That carriers by water, both inland and foreign, are liable as common carriers, in all the strictness and extent of the Common Law rule, see *ante*, § 80, 87, 88, and Abbott on Shipp. Pt. 4, ch. 6, p. 389, 5th edit.

[2] Backhouse *v.* Sneed, 1 Murph. (N. C.) R. 173, and cited *ante*, § 171.

[3] 3 Kent, Comm. 205, and note (1) to Story's Ed. of Abbott on Shipp. p. 341, and Ib. p. 394, note (1) 5th edit.

[4] Abbott on Shipp. p. 382, 383.

a ship were answerable for the loss of the goods occasioned by the seizure of the ship by the officers of the revenue, for a supposed violation of the revenue laws, although in the result of the proceedings under the seizure, it may appear, that there was no cause for condemnation.[1] So, probably, says the same learned author, the master and owners would, by the Common Law, be answerable for a loss arising from the negligence or misconduct of a local pilot on board, to whom the direction of the ship was necessarily intrusted;[2] though this responsibility (in certain cases at least) is now taken away by act of Parliament.[3]

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[1] Gosling *v.* Higgins, 1 Campb. R. 451. This was an action against the owner of a vessel, for non-delivery of ten pipes of wine, shipped at Madeira, to be carried to Jamaica and thence to England. The ship was detained at Jamaica, for a supposed violation of the revenue laws, but on appeal, the sentence of condemnation was reversed, and it was said by Lord Ellenborough, "You have an action against the officers. The shipper can only look to the owner or master of a ship." S. C. Jeremy on Carr. p. 66, 67.

[2] He cites the opinion of the Ch. J. in Bowcher *v.* Noidstrom, 1 Taunt. R. 568.

[3] Stat. 6 Geo. IV. c. 125, s. 55. The American authorities, on the subject of pilots and pilotage, are thus given by the learned annotators to the fifth American Edition of Abbott on Shipping, p. 210; "While a pilot is on board, who is regularly appointed, he has the absolute and exclusive control of the ship in the absence of the master, and is considered as master *pro hac vice;* and consequently the master is not liable for any injury happening to another vessel by the fault or negligence of the pilot during his absence, whatever might be the case, if he were present at the time of the injury. Snell *v.* Rich, 1 John. R. 305; Yates *v.* Brown, 8 Pick. 23; 3 Kent, (5th edit.) 176. Whether the owner would in such case be liable for such injury, was a question left undecided by the Court in the case above cited. In Bussey *v.* Donaldson, 4 Dall. R. 206, it was, however, decided that the owner is liable for such injury, although the pilot is a public pilot of the port; and that the measure of compensation ought to be equivalent to the injury. And such would seem to be the opinion of the Court in Fletcher *v.* Braddick, 5 Bos. & Pull. 182, as it certainly was in The Neptune the Second, 1 Dodson, R. 467. A pilot, while he has charge of the vessel, is the agent of the owner. Yates *v.* Brown, 8 Pick. 23. The owner of a vessel, which, through the fault or

§ 194. If a common carrier by water, in proceeding in the unloading of his vessel, uses the tackle or machinery of

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negligence of any one on board, injures another vessel by running foul of her, is liable to the injured party, although there be a pilot on board, who has the entire control and management of the vessel. Ib. See Pilot Boat Washington *v.* Ship Saluda, U. States Dist. Ct. S. C. April, 1831; Williamson *v.* Price, 16 Martin (Lou.) R. 399; 3 Kent, (5th edit.) 175, 176. The owner must seek his remedy against the pilot, who is answerable as strictly as if he were a common carrier, for his default, negligence, or unskilfulness. See Yates *v.* Brown, 8 Pick. 23, 24; 3 Kent, (5th edit.) 176. Whether the owners are liable for the acts of the pilot when the master is compelled by statute to take him on board, see Attor.-Gen. *v.* Call, 3 Price, 302; Mackintosh *v.* Slade, 6 B. & C. 657; The Christiana, 2 Hagg. Adm. 183; Curtis's Merchant Seamen, 195, 196, note. In a case where a steamboat was hired for the purpose of towing a vessel to which she was fastened, and both were under the direction of a licensed pilot, the owner of the steamboat was held not entitled to damages on account of injury sustained in the course of the navigation, and not caused by undue negligence of the pilot. Reeves *v.* The Ship Constitution, Gilpin, R. 579. Where the injury happens on the sea, &c., there is a familiar remedy for it in the Admiralty, in a suit for *collision*. The Thames, 5 Rob. 308; The Neptune the Second, 1 Dods. R. 467; The Woodrop Sims, 2 Dods. R. 83; The Dundee, 1 Hagg. Adm. R. 109; Gale *v.* Laurie, 5 Barn. & Cressw. 156. The neglect to take a pilot, where it ought to be done, will subject the owners to a suit for the damages that may happen to shippers and others by such default. See M'Millan *v.* U. Ins. Co. 1 Rice (S. C.) R. 248; Keeler *v.* Fireman Ins. Co. 3 Hill, 250; 3 Kent, (5th edit.) 176, note. And if captors neglect to take a pilot on board, and the captured ship be lost in consequence of the neglect, a Court of Admiralty will decree restitution in value against them. The William, 6 Rob. R. 316. Of course pilots themselves are responsible for any damages occasioned by their own negligence or default, (3 Kent, 5th edit. p. 176,) and are entitled to a proper compensation for their services. See Laws of Oleron, art. 23; Molloy, B. 2, ch. 9, § 3, 7; Gardner *v.* Ship New Jersey, 1 Peters, Adm. R. 223, 227; The Schooner Anne, 1 Mason, R. 508. Pilots, like other persons, may entitle themselves to salvage by performing services beyond the mere line of their duty. Dulany *v.* The Sloop Pelagio, Bee's Adm. R. 212; Hobart *v.* Drogan, 10 Peters, 108; Hand *v.* The Elvira, Gilpin, 60; The Joseph Harvey, 1 Rob. Adm. 306; The Gen. Palmer, 2 Hagg. Adm. R. 176; The City of Edinburgh, Ib. 333. A suit lies in the Admiralty for compensation for pilotage performed on the high seas. The Schooner Anne, 1 Mason, R. 508. The pilot is a *mariner*, Ib. See Hobart *v.* Brogan, 10 Peters, 108."

a third person, as in hoisting the goods from the vessel, and the tackle or machinery breaks, and the goods are in consequence injured ; the carrier is responsible.[1]

§ 195. In a case somewhat remarkable in its circumstances, an action was brought against the master of a vessel navigating the river Ouse and Humber from Selby to Hull, by a person whose goods had been wet and spoiled. At the trial it appeared in evidence, that at the entrance of the harbor at Hull, there was a bank on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep, instead of shelving towards the river ; that a few days after this flood, a vessel sunk by getting on to this bank, and her mast, which was carried away, was suffered to float in the river tied to some part of the vessel ; and that the defendant, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe, had the bank been in its former situation, but on the tide ebbing, her stern sunk into the water, and the goods were spoiled ; upon which the defendant tendered evidence to show, that there had been no actual negligence. This evidence was rejected ; and it was further ruled, that the act of God which could excuse the defendant, must be immediate ; but this was too remote ; and the jury were directed to find a verdict for the plaintiff, which they accordingly did. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction given by Mr. J. Heath at the trial, and the plaintiff succeeded in the cause. There was no bill of lading in the case, and no instrument of contract ; and, therefore, the question depended upon general principles, and not upon the meaning of any particular

[1] De Mott *v.* Laraway, 14 Wend. (N. Y.) R. 225.

words, or exception.[1] Now in this case, the act of God in changing the bank, was left out of the question, as not being the immediate cause, and therefore furnishing no excuse. The fastening of the mast, if not the sinking of the ship to which she was attached, were the only remaining causes, and one, if not both, were obstructions placed there by human agency.[2]

§ 196. Where the ship of a common carrier, in a voyage from Hull to Gainsborough, drove on to an anchor in the river Trent, and was, in consequence, sunk, and the goods on board injured, and the accident was occasioned by the neglect of the third party, in not having his buoy out to mark the place where his anchor lay, it was held, that the carrier was bound to make good the loss.[3]

§ 197. In M'Arthur *v.* Sears, in New York, the doctrine, that evidence of care, in case of loss proceeding from the intervention of man, and the agency of a third party, is inadmissible, is fully sustained and supported by an elabo-

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[1] Smith *v.* Shepherd, cited in Abbott on Shipp. p. 384, as having been first tried at the Summer Assizes for Yorkshire, 1795, and the plaintiff was nonsuited, the Judge being of opinion, that no case of negligence was proved. The nonsuit was set aside by the Court of King's Bench, and a new trial granted, that the facts might be more fully inquired into. The account in the text is the evidence given at the second trial. In Easter Term following, a new trial was moved for, but a rule to show cause refused.

[2] See opinion of Cowen, J., in M'Arthur *v.* Sears, 21 Wend. (N. Y.) R. 190.

[3] Proprietors of Trent and Mersey Navigation *v.* Wood, 3 Esp. R. 127; S. C. 4 Doug. R. 287, cited in Story on Bailm. § 518, where it seems to be considered, that both parties were guilty of negligence; the one in leaving his anchor without a buoy; the other, in not avoiding it, as, when he saw the vessel in the river, he must have known, that there was an anchor near at hand. Indeed, it is true, that all the Judges intimated, that there was some slight degree of negligence in the defendant.

rate opinion of the Court, delivered by Mr. J. Cowen. It was an action against the owners of a steamboat, as common carriers, where the boat stranded on entering the harbor in the night time, in consequence of the master mistaking the *light* upon a stranded vessel for a light usually exhibited by the keeper of the beacon light, by means whereof the plaintiffs sustained damage. It was held, that nothing would excuse the carrier, except the two ordinary excepted cases, "inevitable accident" *without the intervention of man*, and the acts of public enemies; that neither of these exceptions existed in this case; and that proof of the utmost vigilance on the part of the master was irrelevant and inadmissible in defence of the action.[1]

§ 198. A *buoy*, it has been held, is a mere artificial and movable mark of the proper channel, and to permit it to be classed among inevitable perils or acts of God, that cause and excuse a stranding, would be opposed to the policy of the law against common carriers, and would commence the application to them of another species of bailment, viz. that of carrying for hire by private conveyance, and not as common carriers.[2] In this case, the plaintiff shipped goods on board a vessel belonging to the defendant, which, by the bill of lading, were to be delivered in Georgetown (S. C.,) "the dangers of the sea only excepted;" but which the consignee refused to receive in consequence of their damaged condition. In an action for the loss of the goods, the defence was, that the loss of the vessel was occasioned by the *shifting of a buoy*, which had been placed in a particular position, to indicate a particular channel. The proof was, that the buoy was in its proper place, when the master left the port, but sometimes drifted, and which had actually occurred, to the extent of one hundred and fifty or two hundred yards, some ten or fifteen days before the vessel was stranded;

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[1] M'Arthur *v.* Sears, 21 Wend. (N. Y.) R. 190.
Reaves *v.* Waterman, 2 Speer (S. C.) R. 197, Evans, J. dissenting.

that the master, in approaching the harbor, steered for the buoy, which was visible, supposing it to be where he had left it; that within a few lengths of the vessel of this object, and upon perceiving that it was wrong, he attempted to turn his vessel, but in so doing, her keel struck, by which the loss was occasioned. It was held, that the excuse set up by the defendant, did not constitute one of those perils that come within the proper meaning of the exception, as to the liability of common carriers, called the "act of God," or the unavoidable "perils of the sea."[1]

§ 199. It is true, that it has been held, in an action on a policy of insurance, that if in moving a ship from one part of a harbor to another, it becomes necessary to send some of the crew on shore to make fast a new line, and to cast off a rope, by which she is made fast, and these men are impressed immediately, before casting off the rope, and thereby the ship goes on shore, it is a loss by the perils of the sea.[2] This decision has, however, as applicable to common carriers, been called in question. In M'Arthur *v.* Sears, it seemed to the Court clear, that such an act as the sudden impressment of seamen, could not be received to exempt a common carrier, either as the "act of God," or the "enemies

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[1] In an action against the owner of a sloop to recover from him, as common carrier, for goods shipped and lost, the charge of the presiding Judge in the Court below, was, that, from the contract with a common carrier, where loss is shown, the burden of proof is upon the defendant to show such act of God, or public enemy, as will excuse him; that it is not a question of fault, as the liability of a carrier may attach when he is wholly faultless; that it was for the jury to decide from the testimony, whether the loss was from a natural cause, which no human prudence could avert. On appeal, the charge was held correct. Ross *v.* Callender, 2 Speer (S. C.) R. 393. In Lawrence *v.* M'Gregor, in Ohio, Wright, J. at nisi prius, charged, that by whatever degree of negligence another boat might run down the carrier's, this formed no excuse. Wright, (Ohio) R. 193.

[2] Hodgson *v.* Malcom, 5 Bos. & Pull. R. 336.

of the state ; " for, although it may be irresistible, yet so it is with many acts merely human, which may be collusively committed.[1] That the carrier is an insurer to subserve the purposes of justice in any one particular case, indeed, cannot be contended, for the authorities are clear and uniform, that the law regards him as an insurer to subserve the purposes of *policy* and *convenience;* and the one is to remove all temptation to confederate with thieves and robbers; and the other to relieve the owner of the property from the necessity of proving any such confederacy.[2]

§ 200. SECONDLY. As to losses by the " king's enemies," or the " enemies of the state," who are sometimes called the " public enemy." By these expressions, in the sense of the law, are understood public enemies with whom the nation or state is at open war ; [3] and likewise pirates on the high seas, who are universally treated as the enemies of all mankind, and who are doomed to be treated and punished accordingly by the laws of civilized nations.[4] The government itself is called upon to protect its subjects from losses by such hazard, inasmuch as private citizens have not the power to furnish the security and protection required.[5] But by enemies is not to be understood thieves and robbers, who are

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[1] M'Arthur *v.* Sears, 21 Wend. (N. Y.) R. 199.

[2] See the opinion of Gibson, C. J., in Hart *v.* Allen, 2 Watts (Penn.) R. 114.

[3] Story on Bailm. § 526.

[4] Ibid. § 512, 526 ; 1 Bell, Comm. p. 559, 5th edit. ; 3 Kent, Comm. 216, 299 ; Pickering *v.* Barclay, 2 Roll. Abr. 248, and Style, 132, and cited in Abbott on Shipp. p. 386 ; Barton *v.* Wolliford, Comb. R. 56, and cited in Abbott on Shipp. p. 386. In note *m* to the page of Abbott just referred to, he cites a passage from the Digest, showing, that the Roman Law held a loss by pirates to be a loss by inevitable casualty : *Si quid naufragio, aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari.* Dig. 4, 9, 3, 1. (*Inde Labeo scribit.*)

[5] Per Hubbard, J., in Thomas *v.* Boston and Providence Railroad Corp. 10 Met. (Mass.) R. 472.

merely private depredators, however much they may, in a moral sense, be at war with society; and so rioters and insurgents are not considered public enemies, in the sense of the law, upon this subject.[1]

§ 201. It has been said, that here, the question may often become material, whether we are to look to the immediate, or to the remote cause of the loss; for in some instances, (as under the common American bills of lading,) the "perils of the seas" are excepted, and not the acts of "the king's enemies." The case has been supposed, that a carrier ship should be driven by a storm on an enemy's coast, and she should there be captured by the enemy, before she could be stranded, it seems then, it is said, that it is a loss by capture, as that is the proximate cause. It is again supposed, that the ship should be first stranded on the coast by the gale, and in consequence thereof, should be afterwards captured by the inhabitants: In that case, it seems, it is said, that it would be deemed a loss, not by capture, but by the perils

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[1] See *ante*, § 191; Mors *v.* Slue, 1 Ventr. R. 190, 238, cited in Coggs *v.* Bernard, 2 Ld. Raym. R. 909, Appx. i. It has been held, under the act of Congress of 30th April, 1790, ch. 36, § 8, that robbery is a substantive piracy, although the same robbery committed on land, is not, by the laws of the United States, punished with death. U. States *v.* Palmer, 3 Wheat. (U. S.) R. 510; U. States *v.* Jones, 3 Wash. (Cir. Co.) R. 209. The true definition of piracy by the law of nations, is robbery upon the seas. U. States *v.* Smith, 5 Wheat. (U. S.) R. 153; U. States *v.* The Pirates, Id. 184. That robbers at sea are pirates, see 27 Ed. III. c. 13, s. 2; Year Book, 2 Rich. III. cited in note to Abbott on Shipp. p. 27. To constitute piracy, within the above-mentioned act of Congress, by running away with the vessel, personal force and violence are not necessary. It is sufficient, if the running away be with an intent to convert the same to the taker's use against the will of the owner, or *animo furandi*. U. States *v.* Tully, 1 Gallis. (Cir. Co.) R. 247; Story's Note to 5th Am. Ed.; Abbott on Shipp. p. 27. The African States, having acquired the character of established governments, and having regular treaties, are not at present considered as pirates. Case of the Helena, 4 Rob. (Adm.) R. 3.

of the sea, upon the same principle; for the gale is the proximate cause of the stranding.[1]

§ 202. It being well established, as a general rule, that no other acts but those which have above been treated of as recognized by the law, will exempt a common carrier from his Common Law liability, and the loss or injury being sufficient proof of negligence or misconduct, or of the intervention of human agency, the *onus probandi* is on the carrier to exempt himself.[2] That the goods, in other words, have been delivered to the carrier, or his agent, and have never been delivered by him to his employer or his agent or consignee, is *prima facie* evidence of negligence or misconduct.[3]

§ 203. Although the general rule is, that a common carrier is respousible for loss or damage where human agency is the immediate or proximate cause, the question may arise, how far his responsibility would be affected by a

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[1] Story on Bailm. § 526, who refers to Hayn *v.* Corbett, 2 Bing. R. 205; Greene *v.* Emslie, Peake, R. 212; Waters *v.* Merchants Louisville Ins. Co. 11 Peters (U. S.) R. 213.

[2] "Every thing is negligence which the law does not excuse." Dale *v.* Hall, 1 Wils. R. 281; *ante*, § 67. As to the rule in respect to private carriers for hire, see *ante*, § 61.

[3] Jeremy on Carr. 126; Story on Bailm. 529; 2 Greenl. Ev. § 219; Forward *v.* Pittard, 1 T. R. 27; Riley *v.* Horn. 5 Bing. R. 217; Hastings *v.* Pepper, 11 Pick. (Mass.) R. 41; Bell *v.* Reed, 4 Binn. (Penn.) R. 127; Clark & Co. *v.* Spence, 10 Watts (Penn.) R. 335; Colt *v.* M'Mechen, 6 John. (N. Y.) R. 160; Murphy *v.* Staton, 3 Munf. (Va.) R. 239. "It is enough to show the damage done, in order to render the common carrier liable; and the burden of proof is on him to show, that it was occasioned by such cause as will exempt him from liability." Per Harper, J., in Ewart *v.* Sweet, 2 Bail. (S. C.) R. 161. See also Smyrl *v.* Niolen, Ib. 421; Turney *v.* Wilson, 7 Yerg. (Tenn.) R. 340; Whitesides *v.* Russell, 8 Watts & S. (Penn.) R. 44; Dunseth *v.* Wade, 2 Scamm. (Ill.) R. 288; Atwood *v.* Reliance Transp. Co. 9 Watts (Penn.) R. 87.

loss which would and must have occurred without such proximate agency. There may have been, for instance, on the part of the carrier, misconduct, negligence, or deviation from duty, or his vessel may be unseaworthy, and a loss happen in consequence, and then, is the carrier excused if it be shown, that the same loss must have happened by lightning? Suppose the case of a voluntary deviation for so short a time, or under such circumstances, as that the vessel must have been overtaken by the same tempest, and the same accident must have occurred, the question would then arise, whether the owner of the vessel would be liable for the loss. Again, a vessel may be unseaworthy, and yet it may be clearly made to appear, that the loss of goods on board on freight, is wholly unconnected with the want of seaworthiness, as being stranded in a hurricane, or captured by an enemy, is the loss to be borne by the carrier, or is it to be deemed a loss by perils of the sea, or by the public enemy? In these supposed and other like events, by the Roman law, the carrier would not be responsible.[1] If the bailee, to use the Roman expression, says Sir William Jones, be *in mora*, that is, if a legal demand have been made by the bailor, he must answer for any casualty that happens after the demand; unless, in cases where it may be strongly presumed, that the same accident would have befallen the thing bailed, even if it had been restored at the proper time;[2] and the doctrine is supported by Pothier.[3]

§ 204. It has been said, that there are (and certainly there are) intimations in various Common Law authorities which lead to a conclusion similar to the one above mentioned of the Roman law; and by some Common Law authorities, the doctrine of the Roman law is directly sustained; although the

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[1] Story on Bailm. § 413 *c.*

[2] Jones on Bailm. p. 70.

[3] Pothier, Prêt à Usage, 55 to 58; Pothier on Oblig. n. 143, 627, 628; and Story, *sup.*

subject has been considered still open to controversy.[1] In the discussion of it, (it has been affirmed by very high authority,) that it deserves consideration, whether there is, or ought to be, any difference between cases, where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases, where there is merely some negligence or omission or violation of duty in regard to it, not conducing to, or connected with, the loss.[2]

§ 205. As to the Common Law authorities in reference to the doctrine, that misconduct, negligence, &c. on the part of the carrier, not conducing to, or not connected with, the loss, should not make him answerable, it has been said, that if goods are improperly stowed on the deck of a ship, and they are washed away by the violence of the storm, the owner of the ship will be liable for the loss, although caused by the perils of the sea; *unless* the danger were such, as would equally have occasioned the loss, if the goods had been safely stowed under deck.[3] In a case in North Carolina, it was expressly held, that, although taking a full price and stowing upon deck, will subject the owner of the vessel to pay damage, if what is so placed be *thereby* lost or injured, yet if *that* did not occasion the loss or injury, he will be no more liable for damage to that part of the cargo, than for damage to the rest of it.[4] If a common carrier receives goods directed to be carried in a particular manner, (as for instance, "Glass with care, this side up,") he is undoubtedly required to carry them in that manner and position; and if negligence and disregard of the directions are clearly proved, the carrier is only obliged to prove that the loss happening, was occasioned by some cause not

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[1] Story on Bailm. § 413 *d*.

[2] Ibid. See *ante*, § 58.

[3] Grane *v*. The Rebecca, cited 6 Am. Jurist, 1, 15, and Story on Bailm. § 413 *d*.

[4] Gardner *v*. Smallwood, 2 Hayw. (N. C.) R. 349.

attributable to this disregard of the direction.[1] Where goods were injured on board a canal boat, by the boat's striking against a stone at the bottom of the canal, by which a hole was knocked in her bottom; in an action for the injury, the Court said, "the goods in question might have become wet in various ways, and thus have received the injury complained of without the boat, in which they were on the canal, being in the least deficient, but on the contrary, perfectly tight, staunch, and strong; and if so, it might be doing great injustice to infer a breach of the promise from that circumstance." [2] If a ship be not seaworthy and is lost, although the loss is occasioned by a peril of the sea wholly unconnected with unseaworthiness, the carrier

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[1] Hastings *v.* Pepper, 11 Pick. (Mass.) R. 41. See Camoys *v.* Scurr, 9 C. & Payne, R. 383.

[2] Humphreys *v.* Reed, 6 Whart. (Penn.) R. 435; and see Clark & Co. *v.* Spence, 10 Ibid. 336. As to the insufficiency of vessel: Per Lord Denman, C. J., in Hollingworth *v.* Brodrick: "The defence of unseaworthiness is in general applied to the time when the risk commenced; that is not done here, nor is the loss stated to have happened in consequence of the unseaworthiness supervening. I own I feel a doubt, whether if it were distinctly averred, that the ship had by gross negligence been brought, during the voyage, to a condition in which she would not be insurable, that might not be a defence. But I think, that, if it were clearly made out, the assured could not say, that the loss was by perils insured against." By Patteson, J.: — "The defence is put entirely upon the fact, that the ship, during the voyage, *was unseaworthy.* It is not stated, that she became so through neglect to repair from time to time, and that that occasioned the loss. I do not know that that would have been a defence. But it is only said, that by some means the ship was greatly damaged. It is clear, that the implied warranty of seaworthiness is satisfied, if the ship is seaworthy at the commencement of the risk." Hollingworth *v.* Brodrick, 7 Adol. & Ell. R. 40. In an action, in Maryland, by the shipper of goods against the master of a vessel, who was also consignee of the cargo, in which it appeared, that the vessel was bound to Barbadoes, but was obliged to put into Bermuda, where she was condemned and the cargo sold, it was held, that the plaintiff might show, that the vessel was unseaworthy at the commencement of the voyage, and recover an amount retained by the defendant for freight. Dickinson *v.* Haslett, 3 H. & J. (Md.) R. 345.

will not be liable for the loss, although he would be liable, if that defect was the cause of the loss.[1]

§ 206. In the case of Davis *v.* Garrett,[2] there is a very pointed intimation, that if the loss *must* have happened to goods on board a vessel, without the misconduct by which it was occasioned, the owner of the vessel would not be liable for it. The facts in this case, were, that the master of a barge *deviated* from the usual course, and during the deviation, a tempest wetted the lime which was on board, and thus setting fire to the barge, whereby the whole was lost. The objection taken by the counsel to a recovery by the plaintiff for the amount of the loss, was, that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss *might* have happened by the very same tempest, if the barge had proceeded in her direct course. Tindal, C. J., in giving the opinion of the Court, answered this argument by saying: "If this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For, if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in Parker *v.* James,[3] where the ship was captured, whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predict, that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right or ordinary voyage. The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong con-

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[1] Story on Bailm. § 413 *d*, referring to the Paragon, Ware R. 322.

[2] Davis *v.* Garrett, 6 Bing R. 716.

[3] Parker *v.* James, 4 Campb. R. 112.

veyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable." But, the real answer to the objection taken by the counsel, the learned Judge proceeded to say, was, "that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action, the bare possibility of a loss, if his wrongful act had never been done. *It might admit of a different construction*, if he could show, not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."

§ 207. In Bell *v.* Reed, in Pennsylvania,[1] Mr. J. Brackenridge seems to have held at the trial, that the carrier was liable for a loss by unseaworthiness, not occasioned by the unseaworthiness. But as the jury found a verdict for the carrier, that point was not material, upon the motion for a new trial. Mr. C. J. Tilghman, in delivering the opinion against a new trial, said: "The man who undertakes to transport by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned, and furnished with sails and all necessary furniture. If a loss happens through defects in any of these respects, the carrier must make it good." It is true the learned Judge added, "The law was laid down fairly, and the fact left to the jury." But as no complaint was, or could, be made by the only party (the defendant,) who had a right to complain of the ruling at the trial against him, he having a verdict in his favor, it may be doubted, if the Court meant at all to affirm the doctrine beyond the point by the Chief Justice.[2] The important case of Hart *v.* Allen, however, in the Su-

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1 Bell *v.* Reed, 4 Binn. (Penn.) R. 127.

2 Comment by Story on Bailm. note 2, to p. 526, 4th edit.

preme Court of Pennsylvania,[1] settles the doctrine in that State. In this case, it was held, in an action against a common carrier for a loss, that it is not sufficient to entitle the plaintiff to recover, that there was a defect about the vessel, or want of skill in the carrier; but it must also be shown, that such defect or want of skill contributed, or may have contributed, in some measure, to occasion the loss; that it is the consequence of negligence, not the abstract existence of it, for which a carrier is answerable.[2]

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[1] Hart *v* Allen *et al.*, 2 Watts, (Penn.) R. 114.

[2] In this case, the above-mentioned case of Bell *v.* Reed is thus commented on by Gibson, Ch. J., who delivered the opinion of the Court: "Standing thus on the principles of the contract, it remains to be seen how the questions stand on authority. The only thing in the books like a judicial decision of the point against the carrier, is the already quoted *nisi prius* opinion of Mr. Justice Brackenridge, which is supposed to have been affirmed by this Court in bank, and which, therefore, merits a particular examination. It had relation to a case of stranding by storm, in which the point of defence was, that the loss had been occasioned by the act of God; to rebut which, evidence was given of want of seaworthiness by reason of certain defects in the cable and hull. The matter was put to the jury as a question of fact, and found for the carrier, and the owner of the goods appealed from an adverse determination of his motion for a new trial. The Judge certainly did charge that it lies at the bottom of the contract, as a condition on which the custody of the goods is charged, that the vehicle be a good one; and that if it be not, the carrier cannot, to excuse himself from a subsequent loss, allege that it was inevitable. That he cannot urge the act of God as an excuse, when he himself had not used the human means and precautions which he had undertaken and was bound to use; and that even a stroke of lightning, or a squall in the harbor's mouth, ought not to be alleged by one who has fraudulently taken goods into an unfit vessel. That he called it fraud to do so; and that it is the faithful carrier only who can be excused on the ground of an act of Providence. That in the case of an accident from winds or waves, it is impossible to say, but the unworthiness of the vessel may have contributed to render the loss inevitable; and that unworthiness being established, the legal presumption is, that it was the cause of the accident. This is the substance of the charge; and it is evident from it, that in fixing the carrier with consequences to which his negligence may have in nowise contributed, the Judge considered the law as dealing with him for

§ 208. The subsequent case of Reed *v.* Dick, in Pennsylvania,[1] is likewise an important case on the subject. It was

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a fraud. In the remarks subjoined to his report of the trial, he avows that his opinion is not founded on the authority of adjudged cases, but on analogies drawn from the contract of insurance, though it be notorious that a breach of the warranty of seaworthiness is not visited on the assured as a penalty, but operates to avoid the policy by the failure to perform it as a precedent condition. Our present business, however, is not with the reasons of the Judge, but to ascertain exactly how far his position was established by the Judges in Bank. In delivering the opinion of the Court, the Chief Justice remarked, that there was no complaint of error of law ; and that the law had been laid down fairly, the fact of seaworthiness having been left to the jury. The generality of this remark is to be qualified by the subject-matter of which it was predicated. Undoubtedly there was no room for complaint in respect of the law, nor could there be, by the owner of the goods, who, as the appellant from a verdict against him, was alone competent to complain ; for the law was certainly laid down fairly, to say the least, as to him. Besides, all the remarks of the Judge which were strictly relevant to the case before him, in which the species of the alleged unworthiness, especially the defectiveness of the cable, would have had an immediate and powerful effect in leading to the catastrophe, seem to have been warranted by the evidence. Now it was these remarks with which, on the motion for a new trial, the Court in bank had to do ; and it would have been a departure from the known habit of the Chief Justice, and perhaps even from the dictates of propriety, to have made the real or supposed errors of the Judge, in an abstract principle, the subject of critical remark. But that the Chief Justice admitted the solidity of the abstract principle, is made more than doubtful by his own compendious statement of the principle which he deemed applicable to the case. 'The man,' said he, 'who undertakes to transport goods by water for hire is bound to provide a vessel sufficient in all respects for the voyage, well manned and furnished with sails, anchors, and all necessary furniture. If a loss happens *through defect in any of these respects*, the carrier must make it good.' What he would have said of a loss admitted to have happened *not* through defect in any of these respects, it is easy to conjecture from the guardedness of his expression ; and I therefore take the adjudication of the Court in bank to be an authority against the principle to which it has been cited ; so that the judgment below, in the case before us, rests on the opinion of Mr. Justice Brackenridge alone, not only unsupported, but contradicted in an

[1] Reed *v.* Dick, 8 Watts (Penn.) R. 480.

held, in this case, that an opinion expressed by the crew of a vessel, in consultation with the master, on the soundness

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important particular by the other Judges. If, as I have said, want of seaworthiness were a fraud, it would vitiate the contract entirely; yet such a notion as the avoidance of the contract for this cause, has, I believe, never been entertained. That the law would presume that the loss arose from unworthiness, admitted or established, is a more reasonable position; but would the presumption, as the Judge seemed to think, be conclusive? I am at a loss to conjecture why it should. The notion seems to rest on the same foundation as the avoidance of the contract for fraud, and is evidently untenable in a case where the reverse of the presumption is admitted, or what is the same thing, is a postulate of the argument. The only other authority which seems to bear at all on the point, is the case of Amies *v.* Stevens, 1 Stra. 128, cited by Justice Brackenridge, but more consonant, it seems to me, to the opinion of Chief Justice Tilghman. The hoy of a carrier with goods on board was sunk, coming through a bridge, by a sudden gust of wind. The owner of the goods, insisting that the carrier was chargeable with negligence in going through at such a time, offered evidence to show, that if the hoy had been in good order, it would not have sunk with the stroke it received; and thence inferred the carrier liable for all accidents that might have been prevented by putting the goods into another hoy. But Chief Justice Pratt held the carrier not liable, the damage having been occasioned by the act of God. For though the carrier ought not to have ventured to shoot the bridge if the bent of the weather had been tempestuous; yet this being only a sudden gust of wind, had entirely differed the case. And no carrier, he said, is obliged to have a new carriage for every journey, it being sufficient if he provides one which, without any extraordinary accident, such as this was, will probably perform the journey. From this, it seems to have been the opinion of the Chief Justice, that to render a carrier liable for an act of Providence, it is necessary that his own carelessness should have coöperated with it to precipitate the event. But the case is of greater value in ascertaining the requisite degree of ability and skill in the captain and crew; which, according to the principal just stated, is not to be measured by the exigences of a crisis, but by its sufficiency to conduct the vessel safely to the place of destination in the absence of extraordinary accident. Nor is the carrier bound to provide a captain who has already made a voyage as such, if he has acquired a competent share of skill in any other station. The first question, therefore, will be, whether the captain and crew of the boat had the degree of ability and skill thus indicated; and if it be found that they had not, then the second

of a link in a chain cable, which they were paying out to prevent the vessel from dragging her anchors, is admissible in proof of its adequacy to the ordinary exigencies of the navigation; that evidence that other vessels driven into port by the same storm, were staunch and strong as any employed in the trade, is competent to show its violence; and that the sails were sufficient, is inoperative where the loss is assumed to have been occasioned exclusively by the insufficiency of the cable. In this case, the opinion of the Court was delivered by Gibson, C. J., as follows: "Whether we look to the carrier's Common Law responsibility, or to the limit assigned to it by the exception in the bill of lading, we must hold him bound, at the peril of consequences actually produced by any defect in that particular, to provide a vessel sufficiently furnished with tackle and apparel to encounter the ordinary dangers of the voyage; not its extraordinary and unforeseen dangers, against which it behooves the merchant to secure himself by a policy of insurance. It might be supposed, therefore, that seaworthiness could not enter into the question of a carrier's liability for a loss from an act of God; or, to speak more reverently, inevitable accident, with which it might seem to have no connection. But the term is used comparatively, and as indicating a result, not exclusively of irresistible force, but of force above what is ordinarily experienced; and deficiency of equipment for ordinary exigencies, may consequently be the effective cause of loss from an extraordinary peril, which would not otherwise have been disastrous. Who can set bounds to the success of human exertion by ordinary means, without which the end would be unattainable? By the energy of the crew, many a ship, whose fate would have been sealed by the

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question will be, whether the want of it contributed in any degree to the actual disaster; but if either of these be found for the carrier, it will be a decision of the cause. It seems, therefore, that, though the exceptions to the admission of the deposition are unfounded, the cause ought to be put, on these principles, to another jury."

breaking of a brace or the snapping of a spar, has been rescued from a lee shore. The longer a sinking ship can be kept lying afloat, the greater her chance of succor; and of the benefit of a chance, the merchant or insurer is not to be deprived; but he would be deprived of it by a defect in the pumps, or by any thing else that would hasten the catastrophe. There may, however, be disasters so sudden and so overwhelming, as to bid defiance to precaution; and in respect to these, want of preventive apparatus for accidents of another kind, would not preclude the carrier from insisting on exemption from a loss occasioned by one of them as an act of Providence: as we ruled in Hart *v.* Allen & Grant, 2 Watts, R. 114, where the damage was induced by capsizing in a squall. Now as the proximate cause of the loss, in the case at bar, was the parting of a cable, its actual sufficiency for ordinary purposes without regard to the master's knowledge of its condition, was the point on which the cause turned; and the objection to the opinion of the crew in consultation with him, was not for its supposed incompetence in the abstract, but for the want of an attestation of it by the oaths of those who had expressed it. I remember not what, or whether any, has been given for the admissibility of such evidence in cases of jettison; but it seems to be admissible, on general principles, as part of the *res gesta*. Seamen are expert in nautical affairs, and their judgment, in matters of opinion, touching the working and preservation of a ship, may be as satisfactorily attested by their acts when impelled by motives of duty and self-preservation, as if it were given under the sanction of an oath. It was remarked by Mr. Justice Story, in Tidmarsh *v.* The Washington Insurance Company, 1 Mason, R. 439, that the standard of seaworthiness is arbitrary and dependent on the opinions of nautical men; and certainly their opinions cannot be better manifested by their oaths than they are by their acts, which go to make up the usages of the port. Besides, when the rejected evidence was proposed, no other proof had been given of the supposed flaw in the cable, than

that a mark had been put upon a link in it by a hand who had left the vessel; and surely to the judgment of that hand, thus indicated, might be opposed the declared judgment of the crew. The evidence of the condition and qualities of other vessels which were unable to keep the lake, was competent to show the violence of the storm; but inoperative, as the turning point of the cause was the sufficiency of the Farmer's anchors and cables. Evidence of the condition of her sails, also, was competent in the first instance, but inoperative. As already observed, the carrier was bound to provide a vessel adequate to the navigation; but according to Hart *v.* Allen & Grant, the question of adequacy arises only where inadequacy could have contributed to the event. Now it appears, without contradiction, that when the chain cable parted, the other one was slipped, and that the vessel was beached by means of her sails at the most eligible place in the harbor. It is clear, therefore, that the sails did their office to the extent of the service required of them."

§ 209. In respect to the *thing* bailed, it has been shown, that supposing the carrier to be accustomed to carry *money* for all persons indifferently, as well as goods, or that it is the usage of the trade or business to take both, the responsibility peculiar to a common carrier extends to both.[1] So it has also been shown, that the responsibility covers the *baggage of passengers*, in stage-coaches, railroad-cars and steamboats;[2] but that *letters* delivered at the post-office,[3] and *slaves* delivered to be transported from one place to another,[4] are things and persons, the undertaking to carry which, does not impose a common carriers's responsibility.

§ 210. The rule of responsibility of course does not cover losses arising from the ordinary deterioration of goods, in

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[1] *Ante*, § 100, *et seq.*
[2] *Ante*, § 107, *et seq.*
[3] *Ante*, § 117, *et seq.*
[4] *Ante*, § 122.

quantity or quality, in the course of transportation, or from their inherent infirmity and tendency to decay, or which arise from the neglect or misconduct of the owner or shipper of the goods. The carrier, for instance, is not liable for any damage from the ordinary decay of *oranges*, or other fruits in the course of their voyage.[1] But the master of a vessel is, nevertheless, bound to take all reasonable care of such *bona peritura*, and if they require to be aired or ventilated, he must take the usual and proper methods for this purpose.[2]

§ 211. So the carrier is not responsible for the ordinary diminution or evaporation of *liquids*, or the ordinary leakage of the casks, in which the liquors are put, in the course of transportation, or from their acidity or tendency to effervesce; as his implied obligation does not extend to such cases,[3] unless to prevent loss from such causes is within his control. An action was brought against the owners of a steamboat on account of loss on a cargo consisting of over two hundred barrels of *molasses*, which the bill of lading stated to have been received in good order and well conditioned, and to be delivered at Pittsburg. The cargo was brought to Louisville, and the state of the water in the river not permitting the boat to proceed to Pittsburg, the molasses was put into a warehouse, and afterwards (with a little delay) re-shipped, and arrived, in the usual time, at Pittsburg. On delivery there, it was discovered, that two of the barrels were missing, seven of them empty or nearly so, and some others only half full. Information was elicited from many witnesses as

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[1] 3 Kent, Comm. 299, 300, 301; Story on Bailm. § 492 *a*, 4th edit.

[2] Abbott on Shipp. p. 371; see Davidson *v.* Gwynne, 12 East, R. 381.

[3] 3 Kent, Comm. *ub. sup.*; Story on Bailm. *ub. sup.* If a pipe of wine, upon the ferment, burst in the wagon, when gently driven, the carrier is not liable; for the fault is in the wine, and the insurer does not insure against the *defects* of the thing itself. Farrar *v.* Adams, Bull. N. P. 69, cited 1 Dane, Abr. 479.

to the trade on the western waters, and on the nature of the article of molasses, and the trade in it; for instance, that, in warm weather, from fermentation, a barrel will be full, and even running out at the bung hole, on its being moved and carried to a dray, and though when still, and in a cool place, the cask will not be full by one fourth or one third; that, on account of the fermentation and expansion of the molasses, it was necessary to have small vent holes on the top of the cask, to prevent its bursting; and that through these vent holes, from three to five gallons will be lost between New Orleans and Pittsburg, if the voyage is in warm weather, as was the voyage in question. It appeared also, that the article in warm weather loses more or less by leakage, according to the goodness of the casks. It was conceded, that the lost barrels must be paid for; but the question was, whether the deficiency in the others was the consequence of defect in the casks, or of bad stowage, or other causes for which carriers were answerable. The following charge to the jury in the Court below was held to be correct: "No care or attention of the carrier could prevent the fermentation and expansion of the molasses in warm weather, by which a considerable quantity of molasses would be lost; this loss, therefore, arising from a law of nature, was necessary, and came within the exception of the act of God. The defendants ought not to be answerable for loss occasioned by the peculiar nature of the article, carried at that season of the year, nor leakage arising from secret defects of the casks, which could not have been observed or remedied after the casks were stowed away; but for all other losses, not thus occasioned, or shown by the defendant to have originated from causes beyond their control, they are answerable." And the Court held, that unless the defendant could prove, that a fraud and imposition was practised upon him, he could not contradict the bill of lading signed by him; and that if the barrels of molasses were injured in their delivery to the carrier, and he saw and knew it, this would not be such a latent defect as would

excuse him from liability for loss, beyond that which was occasioned by the peculiar nature of the article carried.[1]

§ 212. With regard to the manner of *putting up*, and *packing* of the goods, if it is not done in a proper manner by the owner or shipper, the carrier is not responsible for loss in consequence thereof.[2] For careful *stowage* of the goods on board the vessel, the carrier is responsible. The vessel must be furnished with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve

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[1] Warden *v.* Greer, 6 Watts, (Penn.) R. 424 ; And See Leech *v.* Baldwin, 5 Ibid. 446.

[2] 3 Kent, Comm. *ub. sup.*; Story on Bailm. *ub. sup.* Upon this subject we copy the following from Walford's Summary of the Law of Railways, London and Boston, 1850 : — "The ground of defence, that the injury was owing to some internal defect, or to the *improper mode of packing*, &c. of the articles themselves, is one that in various instances has been set up by railway companies. In Norman *v.* London and Brighton Railway Co., which was an action for an injury to some chairs sent by the defendants' railway; the company attempted to show that the chairs were of inferior materials, and badly packed, though ultimately the plaintiff had a verdict. Home Circuit, May, 1843. Again, in Lucus *v.* Birmingham and Gloucester Railway Co., which was an action against the company as carriers for a loss by leakage from a flask of essential oil of lemons, the defence was that the loss arose from the improper packing of the case containing the flask, and not from any negligence on the part of the company. The plaintiff, however, obtained a verdict. Oxford Spring Assizes, 1842. So in Rutley *v.* Southeastern Railway Co., (Spring Assizes, 1845, Maidstone.) This was an action for the loss of some linen goods sent by the defendants' railway, owing, as it appeared, to sparks from the engine getting inside the truck, and setting the bale containing the linen on fire. The defence was that the goods were not properly packed, the tarpaulin which covered the truck, having been full of holes. The plaintiff, however, had a verdict. And where a carrier received several packages, one of watches, another of flutes, &c., and put them all up in one bag, and so sent them by railway, and the flutes were injured, it was left to the jury to say whether the accident was attributable to the carelessness of the company, or whether the plaintiff by his own improper proceeding, contributed to the disaster ; the mode of packing adopted by him having thrown upon the company a more onerous task than if they had received the articles separately. Smith *v.* Birmingham Railway Co., Midland Circuit, 1845."

the cargo from the effects of leakage, according to its nature and quality. And care must be taken by the master (unless by usage or agreement this business is to be performed by persons hired by the merchant,)[1] so to stow and arrange the different articles, of which the cargo consists, that they may not be injured by each other, or by the motion or leakage of the ship.[2] It is evident, therefore, that the decision of a controversy in respect to this particular subject, very much depends upon the facts which distinguish it. In an action against the proprietors of a steam vessel to recover compensation for damage to goods sent by them as carriers, if, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to "perils of the sea" as to negligence, the plaintiff cannot recover; but if the perils of the seas required, that more care should be used in the stowing of the goods (articles of silk and linen) on board, than was bestowed on them, that will be negligence for which the owners of the vessel will be liable. The jury, said Lord Denman, in the course of his summing up, were to see clearly, that the defendants were guilty of negligence before they could find a verdict against them.[3]

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[1] Fletcher *v.* Gillespie, 3 Bing. R. 635.

[2] Abbott on Shipp. p. 346. "The master," says Lord Lyndhurst, C. B. "as servant of the owner, is bound to superintend the stowage, and if in consequence of improper stowage the owner has been called upon, and has satisfied any claim for damages, the master is liable to him. But where the master is told by the owner, that some one will come to superintend and do that, which would otherwise be his duty, he is exonerated. If afterwards, that intention is changed, the owner should communicate it to the master." Swainston *v.* Garrick, Exchequer Trin. T. 1833, cited in note to p. 346, Abbott on Shipp. 5th Am. edit. See also the Schooner Reeside, 2 Sumn. (Cir. Co.) R. 567. As to leakage of a vessel caused by *rats*, see *ante*, § 169, 170. If merchandise in good order is entrusted to a carrier, and it arrives at its destination in a damaged state, when he holds it subject to freight, he is liable for the value; and if he pretends that fraud and concealment were practised upon him, the *onus* of proof lies upon him. Hart *v.* Jones, Stuart, (Low. Canada) R. 589.

[3] The verdict was for the plaintiff, Camoys *v.* Scurr, 9 C. & Payne, R. 383.

§ 213. A common carrier, when he is expressly directed to carry goods delivered to him in a particular manner and position is bound to carry them in that manner and position; and if he carries them otherwise, and they are lost or damaged, the burden will be upon him to prove, that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by the act of God, or the public enemy, or the act or fault of the owner himself. Thus, a box containing a glass bottle filled with the oil of cloves, was delivered to a common carrier, marked "Glass — with care — this side up;" and it was held, that this was a sufficient notice of the value and nature of the contents, to charge him with the loss of the oil occasioned by his disregarding such direction. It was in evidence, and not denied, that the box was stowed in such a manner that the marked side was not kept up, and consequently the large bottle, which was broken by some means in the passage, after it was stowed and before its arrival, bore its weight upon its side, and not on its bottom.[1] But if glass, china, or any brittle or perishable commodity, requiring great care for its safe conveyance, is bailed to a carrier inclosed in boxes, and no directions are given as to how the boxes are to be carried, and no notice of the peculiar nature of their contents, the carrier is only bound to take the ordinary care of the boxes, which their general character and appearance seem to require. In such case, the owner of the boxes is culpable for concealing the peculiar nature of their contents.[2]

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[1] Hastings *v.* Pepper, 11 Pick. (Mass.) R. 41.

[2] See Webb, *in re*, 6 Scott, N. R. 956. In the Superier Court of New York, April 26, 1848, Judge Oakley presiding, there was an action, (Cariss *v.* Johnston,) to recover damages for injuries done to a case of *looking*-glasses shipped on board the defendant's vessel. In his charge to the jury, the learned Judge said: — "I do not consider that common carriers are in all cases responsible for not delivering property in a sound state. They are not warrantors that the property shall remain safe and sound. They are only warrantors for its safe delivery, and their further responsibility depends upon whether they use due care and diligence in

§ 214. A common carrier is liable for the safety of *animals* of the brute creation delivered to him for transportation, though it has been seen, he is not liable, as such, for the transportation of the persons of slaves. Where a *dog* had been delivered to a carrier, and the animal escaped by means of slipping from the noose about his neck, the carrier was held liable, because he had the means of seeing, that the animal was insufficiently secured; and Lord Ellenborough said, that the delivery of the dog was not like the case of *goods* imperfectly packed, since there, the defect is not visible; but the defendant had the means of seeing that the dog was insufficiently secured, and he was bound to lock up the animal, or take other proper means to secure

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carrying the property, or that negligence can be proved against them by any omission on their part to do what prudent men should do under such circumstances. In the present case, no act, or omission of an act, has been proved to show that the defendants were negligent, or that they did any thing to injure the property. If they are responsible, it arises from an inference of law, that if property is given to common carriers for transportation, and when given to them is in a sound state, and that it is in an unsound state when delivered, it is the duty of the common carriers to show how it was injured. For if the property was in a sound state when delivered to the carrier, and found to be injured when delivered to the owner, it would be imposing on him a great hardship to be obliged to show some act of negligence on the part of the carrier. For in order to do so, he must go on board the vessel to come at the facts of the case, and possibly could not succeed in eliciting them. If in this case the jury were satisfied that, when the goods were delivered at the wharf, or put on board the vessel, they were then in a sound state, and that on their arrival at Baltimore they were found to be broken, then the defendants are responsible, unless they show how it occurred. In this case, there was nothing to show that the injury might have occurred from perils of the sea, and it is difficult to account for how it could have happened, unless there was some negligence on the part of the defendants. The law presumes, that if the goods were safe when put on board, that the injury to them arose from negligence on the part of the defendants, unless they show the contrary. And if the injury arose from negligence on the part of the captain or owners, then they are responsible for it, otherwise they are not." Journ. of Comm. April 27, 1848.

the animal.[1] If a horse which escapes from his fastenings on board of a steamboat and is lost in the river, the owners of the boat are responsible; for the horse must have been negligently fastened or the loss would not have occurred; and *primâ facie*, this negligence is attributable to the owners of the boat or their servants.[2] So where an animal is sent over a railroad, the company are liable for any injury it may sustain either by the improper construction of the carriage, or the want of reasonable equipments, or the improper position of the carriage in the train.[3] The rule with regard to proper equipments to insure the safety of an animal holds also as to ferry-boats. A special verdict was found in a case, that the defendant was the owner of a public ferry; that the chain with which the flat was fastened to the bank was unusually large and apparently strong; that in attempting to drive the wagon of the plaintiff, heavily laden, into the flat, the chain broke, in consequence of which the *horse* of the plaintiff was so much injured as to be of no value; that several wagons, equally heavy laden had before passed there; that the chain had been for some time used thereat; that the blacksmith, who mended it, was of opinion that it was equal to any chain he was capable of making; that there was no negligence on the part of the defendant's ferry-man. The Court below pronounced judgment in favor of the defendant; but on a motion to reverse the judgment in favor of the plaintiff, it was entered for the plaintiff, the Court, in giving their opinion, saying — "It must be known to every ferry-man, that the strain upon a chain, when the fore wheels of a loaded wagon first strike against a flat to enter it, is very great, and that, therefore, he ought to be provided with a

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[1] Stuart *v.* Crawley, 2 Stark. R. 323.

[2] Porterfield *v.* Brooks, 8 Humph. (Tenn.) R. 497.

[3] So ruled by Lord C. J. Denman in Walker *v.* London & Southwest Railway Co., Kingston Spring Assizes, 1843, cited in Walf. Sum. of Law of Railways, 305. Palmer *v.* Grand Junction Railroad Co. 4 M. & Welsb. R. 749.

chain of great strength to support such a blow, but particularly when the descent from the bank to the flat is steep and considerable." The Court, further said, that, "in cases of this kind it would be difficult to draw a line between what was due diligence or what was not; but it is not difficult to prove, that, though an unlooked for accident of this sort might happen, without the ferry-man's being provided against it, he ought, however, to be accountable for the injury sustained." [1]

§ 214 *a*. If the animal is injured or destroyed by the peculiar risks to which it is exposed, the carrier is clearly excusable. Thus, if *horses*, or other animals, are transported by water, and in consequence of a storm, they break down the partitions between them, and by kicking each other, some of them are killed, the carrier will be excused; and it will be deemed a loss by perils of the sea.[2] And, in case of an animal sent by railway, it has been ruled, that the company are not liable for an accident arising from the animal's own *viciousness* or want of temper.[3] Such a case would seem to be analogous to the case of the loss of merchandise owing to some inherent defect which caused the destruction of it while in transit.[4]

§ 215. Sometimes goods are put on board a vessel to be stowed *on deck*, and they thus become liable to be thrown overboard in cases of extreme danger to the vessel and crew, and in such event, the loss falls on the owner of the goods, unless so far as the owner of the goods may be entitled to

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[1] Rutherford *v.* M'Gowen, 1 N. & McCord, (S. C.) R. 17.

[2] Gabay *v.* Lloyd, 3 B. & Cress. R. 793; Lawrence *v.* Aberdeen, 5 B. & Ald. R. 107; And see *ante*, § 24.

[3] Walker *v.* London and Southwestern Railway Co., *ub. sup.*; and see also *post*, note to § 277.

[4] See *ante*, § 210, *et seq.*

contribution, as in case of a general average.[1] Yet, if the goods are, without necessity, thrown overboard, the carrier will be chargeable with the loss.[2] If a ferryman should, in the emergency of a storm, throw overboard a *box of jewels*, and it was done from absolute necessity to save life, he would not be responsible; but if done rashly, it would be otherwise.[3]

§ 216. In an action against the defendants, as owners of a certain schooner, for not delivering flour shipped at Georgetown for Portsmouth, it appeared, that twenty barrels of it were shipped to go under deck at a certain price per barrel, and one hundred and forty barrels were shipped to go on deck, at half that price for freight. It appeared, that on coming on Nantucket shoal, in bad weather, and with a heavy sea, the vessel struck, and was in such danger as to

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[1] Story on Bailm. § 530 *a*, 4th edit.; Smith *v.* Wright, 1 Caines (N. Y.) R. 43; Lenox *v.* U. Ins. Co. 3 Johns. (N. Y.) Cases, 178.

[2] Ibid.

[3] Mouse's case, 12 Co. R. 63; Bancroft's case, cited in Kenrick *v.* Eggleston, Aleyn, R. 93; and see Jones on Bailm. 107, 108; Bird *v.* Astcock, 2 Bulst. R. 280; 2 Roll. Abr. 567. "The case of Bancroft, as cited by Lord Chief Justice Rolle, would seem to imply a responsibility of the carrier even in cases of jettison. It is stated thus: A box of jewels had been delivered to a ferryman, who knew not what it contained, and a sudden storm arising in the passage, he threw the box into the sea. Yet it was resolved that he should answer for it. Sir William Jones suspects, that there must have been some proof of culpable negligence in the case, and that probably the casket was both small and light enough to have been kept longer on board than other goods. Even then the case would be sufficiently hard; as the ferryman did not know the contents, and might have acted for the best. But if the doctrine of the case be, that jettison will not, in a clear case of necessity, discharge the carrier, it is not law; for it was expressly decided, in Lord Coke's time, in the case of a bargeman (cited by Lord Coke in Bird *v.* Astcock, 2 Bulst. R. 280,) that where goods were thrown overboard in a great storm to save the lives of the passengers, by lightening the barge, the bargeman was exonerated; for the storm was the act of God, and the occasion of throwing them overboard." Story on Bailm. § 531.

render it necessary, for the preservation of the lives of the crew, and for the safety of the vessel and cargo, to throw some part of the latter overboard ; and accordingly the whole of the deck load, and twenty barrels from the hold, being the plaintiff's flour, were thrown over. The value of the twenty barrels under deck was afterwards settled for in the general average, leaving only the deck load in controversy. The defendants insisted, that they were absolved from liability for the goods shipped on deck, both by the general principles of the law merchant, and by the usage and custom of America. The defendants were held not liable to contribution, as it was in evidence, that the *jettison*, by which the plaintiff's loss was occasioned, was justified by the highest necessity ; and as it was not pretended, that the property could have been preserved by any exertion on the part of the master or mariners.[1]

§ 217. The law on the subject of *jettison* is thus laid down by Tindal, C. J., in the case of Gould *v.* Oliver :[2] "When the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are indeed express on that point ;[3] and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion."[4]

§ 218. If the goods are, without the consent of the mer-

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1 Dodge *v.* Bartol, 5 Greenl. (Me.) R. 286.

2 Gould *v.* Oliver, 4 Bing. (N. C.) R. 142.

3 Valin, tit. dec Capitaine, art. 12 ; Consol del Mar, c. 183.

4 It has been held in the Supreme Court of New Brunswick, that a master of a ship who has signed the usual bill of lading, is not liable for a loss by the *jettison* of goods which have been laden on deck with the knowledge and consent of the shipper and consignee. Johnston *v.* Crane, 1 Kerr, R. 356.

chant, or contrary to established usage, stowed on deck, and are, from their being so placed, thrown overboard in tempestuous weather, the carrier will be answerable for the loss by the *jettison*.[1] Where the master of a vessel received hogsheads of gin on board, to be transported at customary freight, which were stowed on deck, and which were ejected during the voyage by reason of tempestuous weather; it was held, that the owners were liable for the loss, unless such stowage was authorized by consent of the merchant, or by custom. It was not pretended, that the *jettison* was without justifiable cause, but the complaint was *careless stowage*, in putting the gin on deck, when it ought to have been put in the hold.[2]

§ 219. In respect to the doctrine of *general average*, which arises in cases of *jettison*, and other accidents in cases of transportation of goods by sea, the law allows a compensation to the owners of the goods, where the goods are thrown overboard for the common benefit, and they may demand a *pro rata* contribution, from all other persons deriving a benefit from the sacrifice.[3] This subject, however, more appropriately belongs to a treatise on the law of shipping.[4] Carriers on land, it may be added, are entitled to the same equity, and may be entitled, if not to a common contribution, in the nature of a general average, at least, to compensation for expenses incurred by them about the preservation of the goods from extraordinary perils, which do not properly belong to them as carriers.[5]

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[1] 3 Kent, Comm. 206; Crane *v.* The Rebecca, Ware, R. 188, cited in Story on Bailm. note to § 530 *a*; Smith *v.* Wright, *ub. sup.*; Lenox *v.* U. Ins. Co. *ub. sup.*; Waring *v.* Morse, 7 Ala. R. 343.

[2] Barber *v.* Brace, 3 Conn. R. 9.

[3] Smith, Mer. Law, 260; Story on Bailm. § 583.

[4] See Abbott on Shipp. Pt. 3, ch. 8; Stevens on Average.

[5] Story on Bailm. § 389, 584, and *ante*, § 42, 43.

CHAPTER VII.

OF THE RESPONSIBILITY OF COMMON CARRIERS AS RESTRICTED, LIMITED, AND QUALIFIED, BY SPECIAL CONTRACT, AND BY STATUTE.

§ 220. In addition to the *two* instances of exemption from the responsibility of common carriers, (losses by the act of God and the public enemy,) which are accorded by the *Common Law*, there is the instance of exemption by *their own act*, viz. that of a *special acceptance*. The principles of the Common Law are to be understood with the limitation that there is no special contract between the parties, which varies the general obligation of carriers, for if there clearly appear such a contract, it governs the case.[1] The right of admitting qualified acceptances of common carriers, seems to have been asserted in early times. Thus, a special acceptance is recommended by Lord Coke in a note to Southcote's case,[2] in which he says, that if goods be delivered to one to be delivered over, it is good policy to provide for himself in special manner, for doubt of being charged by his general acceptance. Sir Matthew Hale, in giving judgment in Mors *v.* Slue,[3] says, that, "if the master would, he might have made *a caution* for himself, which he omitting, and taking in goods generally, he shall answer for what happens." Although in these cases, the point was not expressly adjudged, that a common carrier may restrict his liability by express

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1 See *ante*, § 59.

2 Southcote's case, 4 Co. R. 84; and see the case cited *ante*, note to § 20.

3 Mors *v.* Slue, 1 Vent. R. 238, (24 and 25 Car. II.); and see Kenrig *v.* Eggleston, Aleyn, R. 93.

contract, yet such was assumed to be good law; and it was only so assumed by Mr. J. Yates, in Gibbon *v.* Paynton,[1] and by Lord Ellenborough, in Leeson *v.* Holt.[2] In Nicholson *v.* Willan,[3] the last named learned Judge found no direct adjudication, that a common carrier may limit his Common Law responsibility, by a special contract; but he relied on the fact, that such an exemption had never been, by express decision, denied. But there was a direct adjudication, in the year 1800, in an action of assumpsit, at *nisi prius*, before Lord Kenyon, against the defendant, as a common carrier, for not safely carrying a chest of tea from London to Leeds. The carrier demanded a certain sum for booking, and refused to take charge of the tea unless such sum was paid; and it was held, that he was not liable to an action if the tea was left without being paid for and was lost. Lord Kenyon said: "When no rate is fixed by law, the carrier is entitled to say on what terms he will carry; he is not obliged to take every thing which is brought to his warehouse, unless the terms on which he chooses to undertake the risk are complied with by the person who employs him. The old mode of declaring used to be on the custom of the realm; but this is in *assumpsit*, it is founded in *contract*, and the contract must, therefore, govern the parties."[4] The doctrine is considered to be now fully recognized and settled, beyond any reasonable doubt, in England.[5]

§ 221. The subject was fully considered in Gould *v.* Hill,

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[1] Gibbon *v.* Paynton, 4 Burr. R. 2301.

[2] Leeson *v.* Holt, 1 Stark. R. 186.

[3] Nicholson *v.* Willan, 5 East, R. 513.

[4] Anonymous *v.* Jackson, Peake's Add. N. P. Cas. 185.

[5] Story on Bailm. § 549; Clay *v.* Willan, 1 H. Bl. R. 298; Harris *v.* Packwood, 3 Taunt. R. 264; Smith *v.* Horne, 8 Ib. 146; Riley *v.* Horne, 5 Bing. R. 217; and see English cases cited in Hollister *v.* Nowlen, Appx. p. xviii., and in Cole *v.* Goodwin, Appx. p. xxxiii.

in New York,[1] and the conclusion arrived at by Cowen, J., who gave the opinion of the Court, was, that a common carrier could not restrict his obligation, even by a special contract.[2] But Bronson, J., in giving the opinion of the Court, in Hollister *v.* Nowlen,[3] was not disposed to deny, that a common carrier may, by express contract, limit his responsibility. Attention was given to the subject in the late case of the New Jersey Steam Navigation Company, in the Supreme Court of the United States,[4] and the Court expressed themselves unable to perceive any well founded objection to a restriction, by a special contract, or any stronger reasons for forbidding it, than exists in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.[5]

§ 222. In respect to carriers by *water* and by *sea*, whenever the master and owners of a ship engage with separate merchants to convey the goods to the place of her destination, the contract is said to be for a conveyance in a *general ship*;[6] and it is usual to advertise such ships in the newspapers, or in cards and handbills; and care should be taken in doing this to insert nothing in the advertisements which it is not the ship-owner's intention to make strictly good; since it may not be clear, that some of the terms of such

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[1] Gould *v.* Hill, 2 Hill (N. Y.) R. 623.

[2] See the case more fully stated, *post*; and see the opinion of Cowen, J., in Cole *v.* Goodwin, Appx. p. xxxiii.

[3] Appx. p. xviii.

[4] New Jersey Steam Navigation Company *v.* Merchants Bank, Dec. Term Sup. Co. U. States, 1847, Appx. liv. See also the opinion of Huston, J., in Bingham *v.* Rogers, 6 Watts & S. (Penn.) R. 499.

[5] In New York the question considered by Bronson, J., as "perhaps debatable," Wells *v.* Steam Navigation Co. 2 Comst. (N. Y.) R. 209. See *post*, § 239.

[6] See *ante*, § 89.

advertisement may not be construed as incorporated into the contract.[1]

§ 223. But the instrument to which reference is generally had for the terms of such a contract is the *Bill of Lading*, the substance of which is a formal acknowledgment of a receipt of goods, and an engagement to deliver them to the consignee or his assigns.[2] Several copies of such written contract are commonly made out, of which the merchant sends one or two to the person for whom the goods are destined, and retains one for himself.[3] The modern English form of the bill of lading contains these words, — "the act of God, and the king's enemies, *fire*, and all and every other dangers of the seas, rivers and navigations of whatever nature and kind soever, excepted." The two first of these, we have seen, are exceptions even at Common Law; and the third was made so, in England, by stat. 26 Geo. 3, c. 86, s. 2, which enacts "that no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good to, any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever which shall be shipped, taken in, or put on board, any such ship or vessel, by reason or means of any fire happening to or on board of said ship or vessel." Lord Tenterden remarks, that the master is not mentioned therein, and that it may therefore be doubtful, whether his responsibility is in this case removed by the statute, but that the insertion of the word "fire" in the bill of lading certainly removes it.[4]

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[1] Abbott on Shipp. Pt. 2, ch. 2.

[2] Per Rogers, J., Coke *v.* Cordova, 1 Rawle (Penn.) R. 203; Ferguson *v.* Cappeau, 6 H. & Johns. (Md.) R. 394.

[3] Smith, Mer. Law, 176.

[4] Abbott on Shipp. Pt. 3, ch. 4. "The same statute enacts (sect. 3,) that no master, owner, or owners of any ship or vessel, shall be liable to answer for, or make good any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which shall be

§ 224. In this country, although the loss of the property delivered for transportation, by an accidental fire furnishes

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shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing, to the master, owner, or owners of such ship or vessel, the nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones. By stat. 6 Geo. 4, (Pilotage Act,) c. 125, s. 53, owners and masters of ships are exempted from liability for any damage arising from the want of a licensed or duly qualified pilot, unless it be proved that such want arose from any refusal to take one on board, or from wilful neglect, in not heaving to, or using all practicable means consistent with the ship's safety, for the purpose of taking on board any pilot who may offer; and sect. 55 exempts them from liability for damage arising from the neglect, default, incompetency, or incapacity of any licensed pilot in charge of the vessel, so long as such pilot shall be duly qualified to have charge of the vessel, or no duly qualified pilot shall have offered to take charge thereof. It will be seen that the Common Law liability of ship-owners is discharged to a considerable extent by these enactments; where it remains, it is restricted to a certain ascertainable amount by stat. 7, Geo. 2, c. 15, which exempts the owners from responsibility for loss, by reason of any embezzlement, secreting, or making away with, by the master or mariners; or for any act, matter, or thing, damage, or forfeiture, done, occasioned, and incurred by the same persons, without the privity of the owners, further than the value of the ship, with her appurtenances, and the freight due, or to grow due for the voyage wherein such loss happened; (sect. 1. See Sutton *v.* Mitchell, 1 T. R. 18.) Stat. 26 Geo. 3, c. 86, s. 1, extends the provisions of this act to all cases of robbery, though the master or mariners be not concerned therein. By stat. 53 Geo. 3, c. 159, owners are not liable to answer for, or make good any loss or damage arising by reason of any act, neglect, matter, or thing done, committed, and occasioned without the fault and privity of such owner or owners, which may happen to any goods, wares, merchandises, or other things laden or put on board the ship, further than the value of the ship and freight due, or to grow due, during the voyage which may be in prosecution, or contracted for at the time of the happening of the loss. This statute further defines what shall be considered freight, within its meaning, (sect. 2,) and that of the two prior acts; and orders that distinct losses, happening during the same voyage, or same interval between two voyages, shall be compensated in the same way, and to the same extent, as if no other loss had happened during the same voyage or interval; and, as well as the two former ones,

no sufficient excuse, yet it may be rendered otherwise by the terms of the bill of lading.[1] In Patton *v.* Magrath, in South Carolina,[2] Richardson, J., says: "Need I remind the owners of steamboats, that they have but to give public notice, that they will not be liable in certain classes of cases; and, to deceive no one, give no other bill of lading but with the express written condition, 'not to be liable for accidents by fire,' *and they make the desired exception.*" In Swindler *v.* Hilliard & Brooks, in the Court of Appeals of South Carolina, in 1846,[3] it was held, that a common carrier might limit his liability by a special contract, that is, by a bill of lading containing the exception, "dangers of *fire* and navigation only excepted;" and that the term *fire* meant *any* fire, and was not restricted to fire originating from the furnace of the boat. It may sometimes, however, be somewhat questionable what is a loss by fire. Where the register of a sugar-house was kept shut up by mistake, so that the sugar was overheated and spoiled, this was held, in a suit on a policy of insurance, not to be a loss *by fire*, but *by mismanagement.*[4]

§ 225. In the important case of the New Jersey Steam

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provides a proportionable compensation in cases where the value of the ship and freight is less than the total amount of losses, and a mode of distribution and relief in equity. But this act does not extend to vessels used solely in rivers and inland navigations, nor to any ship not duly registered according to law; nor do any of the acts extend to lighters and gabbets; (Hunter *v.* M'Gown, 1 Bligh, 573.) The benefit of the three last mentioned acts does not extend to masters; and the last contains a provision against relieving the master, who happens to be a part owner, from responsibility; yet if he be sued along with the part owners, he will be protected as well as they; for it is a rule, that the damages given against co-defendants must be one and the same sum; (Wilson *v.* Dickson, 2 B. & A. 2.")

[1] Parker *v.* Flagg, 13 Shep. (Me.) R. 181.

[2] Patton *v.* Magrath, Dud. (S. C.) R. 159.

[3] Swindler *v.* Hilliard, 2 Rich. (S. C.) R. 286.

[4] Austin *v.* Drew, Taunt. R. 435; 4 Campb. R. 380.

Navigation Company *v.* Merchants Bank, in the Supreme Court of the United States,[1] it appeared that one W. F. Harnden was engaged in the business of carrying for hire packages of goods, specie and bundles of all kinds, for any persons who would employ him, to and from the cities of New York and Boston; and that his mode of conveying them was the established public conveyances between those cities. That in the exercise of his employment, he had entered into an agreement with the above-mentioned Company, by which, in consideration of a certain sum per month, he was to have the privilege of transporting in their steamers a wooden crate of given dimensions, subject to these conditions. 1. "The crate, with its contents, to be at all times exclusively at the risk of the said Harnden, and the company not, in any event, to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, &c. to be conveyed or transported by him in said boats, or otherwise in the boats of said company. 2. That he should annex to his advertisements published in the public prints, the following notice, which was also to be annexed to his receipt of goods or bills of lading. '*Take Notice:* William F. Harnden is alone responsible for the loss or injury of any articles committed to his care; nor is any risk assumed, nor can any be attached to the proprietors of the steamboats in which his crate may be, and is transported, in respect to it, or its contents, at any time.'" The question being made, whether it is competent for the common carrier to restrict his obligation by such an agreement, the Court declared it as their opinion, that, as the extraordinary duties annexed to his employment concerns only, in the particular instance, the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, they were unable to perceive any well founded objection to the restriction. The extent of the restriction of the Common

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[1] New Jersey Steam Navigation Co. *v.* Merchants Bank, Appx. p. liv.

Law liability, in such cases of express contract, the Court held, is, that the carrier is not to be regarded in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of a private carrier, or of an ordinary bailee for hire ; or, in other words, he was answerable only for misconduct or the want of ordinary diligence.[1]

§ 226. There has prevailed, for a long period, a practice, in respect to carriers *by water*, of accompanying the shipment with a bill of lading, which specifies the " perils " or the " dangers " of the *sea*, or of the *river*, as excepted. The precise meaning of these words, and whether it is exactly commensurate with that of the words " act of God," (from liability for losses by which the carrier is by law always exempted,) has been already considered.[2] In Williams *v.* Grant, in Connecticut,[3] Mr. J. Gould held, that common carriers were not liable for losses by perils of the sea, whether the bill of lading contained any exception or not ; and the same point was affirmed in the same State, by the whole Court in a subsequent case.[4] But, nevertheless, as has been shown, the words in question do extend to some events not attributable to natural causes.[5] In any event, however, as has also been shown, they do not include losses that might have been avoided by the exercise of reasonable skill and diligence, and by proper conduct.[6] And so likewise may it be said of the exception in bills of lading of " dangers of

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[1] As has been laid down, *ante*, Chap. III. In the case of Hale *v.* New Jersey Steam Navigation Company, 15 Conn. R. 539, there was no *bill of lading*. See the case stated, *ante*, § 158.

[2] *Ante*, § 166.

[3] Williams *v.* Grant, 1 Conn. R. 487.

[4] Crosby *v.* Fitch, 12 Conn. R. 410. See also Neal *v.* Sanderson, 2 Smedes & Marsh. (Missis.) R. 572.

[5] *Ante*, § 166 – 169.

Ante, § 167.

the *lake*," notwithstanding which the owners are liable for a loss by *negligence*;[1] and so also are they for a loss in consequence of *deviation*.[2] Where a bill of lading was signed by the master of a vessel, acknowledging the receipt of certain goods, and stating that they were to be transported from Buffalo to Cleveland, "the dangers of the lakes and rivers only excepted:" it was held, that the legal effect of this agreement was to convey the goods, from Buffalo to Cleveland, by the most direct route.[3]

§ 226 *a*. No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance.[4] The declaration, in an action on a contract of affreightment, stated that the plaintiff had shipped on board the defendant's ship, then in the Bay of Gibraltar, and bound for London, certain goods to be safely conveyed to London, the act of God, the queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats, excepted; the breach stated, was that the defendant failed so to convey and deliver the goods agreeably to his undertaking; and the plea was, that the ship, in the course of her voyage, called at Cadiz (agreeably to the terms of the contract) and was then within the jurisdiction of the officers of customs there, and of a certain Court (described in the plea); that while the ship was there, the goods were, according to the law of Spain, lawfully taken out of the ship by the said officers, against the will and without the default of the defendant, on a charge of suspicion of their being contraband according to the law of Spain, and were confiscated by a decree of the said Court. It was held, on demurrer, that the plea alleged

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1 Fairchild *v*. Slocum, 19 Wend. (N. Y.) R. 329.

2 See *ante*, § 175 – 180.

3 May *v*. Babcock, 4 Ohio R. 334.

4 Per Lord Ellenborough, in Atkinson *v*. Ritchie, 10 East, R. 533.

no excuse within the express exceptions in the contract; that the decree of confiscation was in itself no answer; and that it did not appear by the plea to have been incurred by any fault in the plaintiff. The defendant's contract was, in effect, a contract of insurance against all but certain specified risks, and the seizure in question was not one of them.[1]

§ 227. The privilege of transshipment in a bill of lading reserved to the carrier does not discharge him from any responsibility which is incident to his contract, until the goods be delivered at their destined port. A stipulation, for instance, in a bill of lading, that the shipper, in case of low water in the river, may re-ship in other craft, does not vary his obligation to deliver safely. Such stipulation is for the benefit of the carrier, in securing to him the advantage of as great a portion of the freight as he could earn, and to throw upon the owner any increase of expense; and the relation and responsibility of a common carrier continues from the shipment of the goods until their arrival at the destined point of delivery.[2] Where the undertaking was to deliver a cargo, with the privilege of re-shipment at a particular place on the way, and the undertaker stopped short of the point designated, and the cargo was lost in a storm, it was held, that he was responsible. As the storm was a peril of the river, and an act of God, the carrier would have been excused if he had encountered it in the ordinary course of the voyage, and of his duty, but as it was encountered when out of the course of his voyage and of his duty, and might have been avoided but for a disregard of his duty and of his contract, the carrier made himself liable.[3] By the insertion, therefore, in the contract, of these words "the privilege of re-shipping," although the carrier is allowed to transship

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[1] Spence *v.* Chadwick, 10 Adol. & Ell. R. (N. S.) 517.

[2] Whitesides *v.* Russell, 8 Watts & S. (Penn.) 44; M'Gregor *v.* Kilgore, 6 Ohio R. 143; Dunseth *v.* Wade, 2 Scamm. (Ill.) R. 288.

[3] Cassilley *v.* Young, 4 B. Mon. (Ken.) R. 265.

or re-ship in another vessel, his contract is not performed until the delivery of the goods at the place of their destination.[1]

§ 288. A *parol* agreement between the master of a vessel and a shipper of goods, before and at the time of executing a bill of lading, permitting the master to deviate from the usual route, is inadmissible evidence in an action by the shipper against the owners of the vessel, to recover for the loss of the goods. But parol evidence of the custom of navigating Lake Erie, is admissible, though not for the purpose of varying a written contract, but for the purpose of carrying it into execution, as understood by the parties.[2]

§ 229. Evidence is not admissible to vary the common form of a bill of lading, by which the goods were to be delivered in good order and condition, "the dangers of the seas only accepted," by establishing a *custom*, that the owners of packet vessels, between New York and Boston, should be liable only for damage to goods occasioned by their own neglect.[3] Mr. J. Story, in giving his opinion in this case, said he could not but deem every relaxation of the Common Law, in relation to the duties and responsibilities of the owners of carrier ships, to be founded in bad policy, and detrimental to the general interests of commerce. In respect to the *established usage* set up in the case, the learned Judge said: — "I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business or trade, to control, vary, or annul the general liabilities of parties under the Common Law, as well as under the commercial law. It has long appeared to me, that there is no small

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1 Little *v.* Semple, 8 Missou. R. 99; and see *ante*, § 95, 96, 97.

2 May *v.* Babcock, 4 Ohio R. 334.

3 The Schooner Reeside, 2 Sumn. (Cir. Co.) R. 567.

danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well known and well settled principles of law. And I rejoice to find, that, of late years, the Courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter, to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties. Now, what is the object of the present asserted usage or custom? It is to show, that, notwithstanding there is a written contract, (the bill of lading,) by which the owners have agreed to deliver the goods, shipped in good order and condition, at Boston, the danger of the seas only excepted;

yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas has not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. In short, the object is, to substitute for the express terms of the bill of lading an implied agreement on the part of the owners, that they shall not be bound to deliver the goods in good order and condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me that this is to supersede the positive agreement of the parties, and not to construe it."

§ 230. In a case in the Court of Appeals of South Carolina, in 1817, in which the action was to recover damages for the loss of a large number of bales of cotton that were consumed by fire on the defendants' steamboat, one of the legal propositions of the appellant was, that the ship-owners were exempt from liability at Common Law for the accidental loss by fire by reason of the *usage* of the carriers in the particular trade, exempting them from such Common Law liability. The Court held, that a *custom* or *usage* intended, as in this case, to alter established rules of law, must be of very long standing, so as to imply the general acquiescence of all parties; whereas the custom or usage in question of exemption from losses by fire, was not only of very recent origin, but had, in that State, been continually resisted.[1]

§ 231. But between the shipper and the ship-owner the

[1] Singleton *v.* Hilliard & Brooks, 1 Strobhart, (S. C.) R. 203, the Court referring to Patton *v.* Magrath, Dud. (S. C.) R. 163, and Swindler's case, 2 Rich. (S. C.) R. 286. See also Turner *v.* Wilson, 7 Yerg. (Tenn.) R. 380. It is the doctrine in Ohio, that in bills of lading, where the terms used, have, by usage, acquired a particular signification, the parties will be presumed to have used them in that sense. But usage will not be permitted to control the terms used, unless it is established by clear and satisfactory proof. Wayne *v.* Steamboat Gen. Pike, 16 Ohio R. 421.

bill of lading is not conclusive as to the quantity of merchandise shipped on board; as in the case of a bill of lading signed by the master for *eight* hundred and ninety bags of pepper, and the declaration alleged, that that number were shipped, and that some of them had been lost; but the defence was, that only *seven* hundred and ninety bags were, in fact, shipped, and that the captain had been induced to sign the bill of lading for the greater number by the fraud of the plaintiff's agent; Chief Justice Tindal said, he was of opinion, that, as between the original parties, the bill of lading was merely a receipt, liable to be opened by evidence of the real facts, and left the question to the jury, whether, in fact, the greater or the lesser number of bags were shipped.[1] So the carrier may be permitted to give evidence in contradiction to his bill of lading, that the goods were delivered to him in good order, if it be clearly proved, that a fraud or imposition was practised upon him.[2] But this rule does not apply to *third* persons, and if a third person is induced to become an indorsee of a bill of lading, for the value of it, the ship-owner cannot, as against such indorsee, dispute what the master, by his signature, has affirmed.[3] The master, therefore, should be careful not to sign bills of lading, until the goods are actually delivered to him, nor to permit the insertion of statements at variance with the facts; as by so doing, he may bind his owners, and become himself responsible to them.[4]

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[1] Bates *v.* Todd, 1 Moo. & Rob. R. 186; and see Berkely *v.* Watling, 7 Adol. & Ell. R. 29. Where a bill of lading is signed and delivered before the goods are shipped, or even purchased, it will cover any goods afterwards shipped as and for those named in the bill of lading. Rowley *v.* Bigelow, 12 Pick. (Mass.) R. 307.

[2] Warden *v.* Green, 6 Watts, (Penn.) R. 424.

[3] Howard *v.* Tucker, 1 B. & Adol. R. 512.

[4] Abbott on Shipp. Pt. 4, ch. 4. A bill of lading, signed by the master, for goods delivered on board his vessel for transportation, is the contract of the owner of the vessel. Ferguson *v.* Chappeau, 6 H. & Johns. (Md.) R. 394.

§ 232. But there never have been many questions, and but few comparatively are likely to arise, upon the interpretation of *positive* or *express* contracts entered into for the transportation of goods. Many of the questions which have of late years, in England, engaged the attention of Courts, have been upon *implied* contracts, or upon the validity, obligation, and effect of the written or printed NOTICES given by common carriers in the course of their public employment, and posted up and distributed, which announced, that the carrier would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. This practice in England grew out of the advancement of commerce, the increase of personal property, and the consequent frequency with which articles of great value and small bulk were transmitted from one place to another. Carriers thinking it reasonable, began to insist, that their employers should, in such cases, pay a rate of remuneration proportionable to the risk undertaken, and they did so by the means just mentioned.[1] But however long continued may have been the practice of giving such notices, their legal validity was not fully established, until, at least, as late a period as the year 1785. For this we have the authority of Mr. Justice Burrough, who, in Smith *v.* Horne,[2] said, "the doctrine of notice was not known until the case of Forward *v.* Pittard,[3] which I argued many years ago." That case was decided in the year just mentioned, and it is remarkable, that if the question of notice was, in any form, before the Court, it should not have been mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by *fire*, without his default. The doctrine was not recognized in Westminster Hall until the year 1804, when

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[1] See note to Coggs *v.* Bernard, 1 Smith, Lead. Ca. 225.

[2] Smith *v.* Horne, 8 Taunt. R. 144.

[3] Forward *v.* Pittard, 1 T. R. 27.

the case of Nicholson *v.* Willan[1] was decided, in which Lord Ellenborough said "the practice of making a special *acceptance* had prevailed for a long time, and that there was no case to be met with in the books, in which the right of the carrier thus to limit, by *special contract*, his own responsibility, has ever been by express decision denied." But whatever may have been the rule where there was an *express* contract, or in other words, a special contract *in fact*, the learned Judge could not have intended to say that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been *implied* from such a notice. Not longer before than the year 1793, Lord Kenyon, in considering obligations created by operation of law, and those created by a party's *own act*, he puts the case of common carriers, and said, they could not discharge themselves by any act of their own, "as by giving notice, for example, to that effect."[2]

§ 233. The validity of these notices gradually became, however, firmly established in England; and although many learned Judges have expressed a regret, that they were ever recognized in Westminster Hall,[3] yet Chief Justice Best, in Riley *v.* Horne, appears to think them proper. After adverting to the fact, that the Common Law makes a common carrier liable, for every loss except by the act of God and the king's enemies, that learned Judge proceeded to say: "As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at their place of destination, as for the labor and expense of carrying them there. Indeed,

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[1] Nicholson *v.* Willan, 5 East, R. 507.

[2] Hyde *v.* Proprietors of Trent and Mersey Navigation, 1 Esp. R. 36.

[3] See a review of the English cases in Hollister *v.* Nowlen, Appx. p. xviii; and in Cole *v.* Goodwin, Appx. p. xxxiii.

besides the risk that he runs, his attention becomes more anxious, and his journey more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages, as to be the objects of theft or embezzlement, a strong and more vigilant guard is required, than when he carries articles not easily removed, and which offer less temptations to dishonesty. He must take what is offered to him, to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him. By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust, if it did not afford them the means of knowing the extent of their risk. Other insurers, whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole, always have the amount of what they are to answer for specified in the policy of insurance."[1]

§ 234. Notwithstanding the force of the reasons above advanced by Mr. J. Best in favor of the equity of the rule, that a common carrier should be allowed to stipulate by

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[1] Riley *v.* Horne, 5 Bing. R. 217. See also Walker *v.* Jackson, 10 M. & Welsb. R. 161 ; and the review of the numerous English cases in Hollister *v.* Nowlen, and Cole *v.* Goodwin, *ub. sup.* In Wyld *v.* Pickford, 8 M. & Welsb. R. 443, the defendants gave notice to the plaintiff, that they would not be liable for loss or damage done to certain goods delivered to them for the purpose of carriage, unless the same were insured according to their value, and paid for at the time of delivery ; which limitation, said Parke, B., who delivered the judgment of the Court, "it is competent for a carrier to make, because being entitled by Common Law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the Common Law, and insist upon his own ; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms."

a general notice, that they will not be responsible for any loss beyond a certain sum, unless the goods were specially entered and paid for; yet the subject has proved as fruitful a source of legal controversy, as the subject of an acknowledgment of debt, or a new implied promise, under the statute of limitations; and the policy of the law has been defeated as much by extravagant equitable constructions in respect to the former subject, as in respect to the latter. The reader has only to refer to the cases of Hollister *v.* Nowlen, and Cole *v.* Goodwin, at the end of the volume, to be willing to admit the truth of this assertion; and Mr. Bell, in his Commentaries, adduces evidence of the truth of it: "Of the extravagance," he says, "into which this doctrine has run, and the distracting points which come to be involved in it, the newspapers and the books of reports are full. One carrier frees himself from responsibility for *fire;* [1] another even from the common responsibility of the contract, for negligence.[2] One man is bound by a notice, which has appeared in a newspaper that he is accustomed to read; [3] another person, because a large board was stuck up in his office; [4] and another is freed from the effect of the notice in the office, because hand-bills were circulated of a different import.[5] Then, it is said, what if he cannot read? or if he does not go himself, but sends a porter, and *he* cannot read? Or, what if he be *blind*, and cannot see the placard? And thus difficulties multiply; the Courts are filled with questions, and the public left in uncertainty." [6] The same learned writer also says: "The unhappy consequences of this doctrine are to be ascribed, as it would seem, to a wrong bias unfortunately admitted in the progress of its establishment,

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[1] Maving *v.* Todd, 1 Stark. R. 79.
[2] Leeson *v.* Holt, 1 Stark. R. 186.
[3] Ibid.
[4] Clerk *v.* Grey, 4 Esp. R. 177.
[5] Cobden *v.* Bolton, 2 Campb. R. 108.
[6] 1 Bell, Comm. 382.

from not keeping a steady eye upon the principles which ought to have regulated the practice of giving notices. There seems to be only one point to which, legitimately notices of carriers could be admitted, viz. the regulation of the consideration for risk. Saving always the power of making an *express* contract, the effect of a mere notice ought justly to be restricted to this point: as to which alone it is competent for a carrier to refuse employment. Had this been attended to, the law on this subject would have been conformable to the general system of jurisprudence, and a sort of legislative power never would have been assumed by common carriers. Any exorbitancy of charge would at once have been brought to a true standard by judicial determination; while the responsibilities of the carrier, under the Common Law of his contract, and on the principles of of public policy, would have remained untouched but by *positive* agreement in each individual." [1]

§ 235. It is generally admitted, in respect to the subject of notices, first; that a carrier's general run of goods may be estimated, and notice given, that he will not be answerable for those of a different description, as jewelry, money, &c. of extraordinary value; secondly, that for the greater risk attending goods of such a description, and the greater care required, a higher consideration, partly as hire, and partly as insurance, should be given. The English decisions, for the most part, have gone only to this extent; and although none of them were made at the time of the American Revolution, yet to deny that they are not to enter into and form a part of our own law, limited as above mentioned, would be, according to the opinion, and in the words of Mr. J. Cowen, "to rise against the united authority of Westminster Hall both before and since the Revolution." [2] But there have

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[1] 1 Bell, Comm. 382.

[2] Cole *v.* Goodwin, Appx. p. xxxiii.; 2 Kent, Comm. 606, 607.

been some decisions in England, which go to a much greater extent than this, and so far, as to permit a common carrier, without an express contract, and at his own discretion, by a mere general notice, to put an absolute limit on the public duty and responsibility which are imposed upon him by public policy; and this is the important subject of attention. As was asserted by an English writer more than thirty years ago: "The lawyer's discrimination and judgment must be chiefly directed to, and conversant with, the effect of these undertakings by which common carriers have almost entirely divested themselves of the character of public servants, and have endeavored to *assume* the privileges of special contractors; in direct violation of the policy, and in opposition to the first principles of the Common Law." [1]

§ 236. There are two *nisi prius* decisions in England, which allow the carrier to cast off all liability whatever. In Maving *v.* Todd,[2] the defendant had given notice, that he would not answer for a loss by *fire*, and such a loss having occurred, Lord Ellenborough thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In Leeson *v.* Holt,[3] tried in 1816, the same learned Judge made a like decision; though he remarked, that "if this action had been brought twenty years ago, the defendant would have been liable; since *by the Common Law* a carrier is liable in all cases except two." Here is a very distinct admission of what will be found in many of the English cases, that the Courts had departed from the law of the land.

§ 237. Now, admitting the carrier's right so to restrict his responsibility as not to be liable for a loss by *fire*, happening

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[1] Jeremy on Carr. 3.

[2] Maving *v.* Todd, 1 Stark. R. 72.

[3] Leeson *v.* Holt, 1 Stark. R. 186.

otherwise than by lightning, by an *express contract* entered into *by the parties*, it by no means follows, he can do so merely by his *own act;* or, that it may be inferred from a mere general notice to the public, (though brought home to the knowledge of the other party,) limiting his obligation, which may or may not be assented to.[1] The law, as laid down by the Court in Hollister *v.* Nowlen, in New York, and confirmed by the Supreme Court of the United States, in the late case of The New Jersey Steam Navigation Company *v.* Merchants Bank,[2] is, that if any implication is indulged in, from the delivery of the goods to the carrier, under the general notice, it is as strong that the owner intended to insist upon his rights, and the carrier's duties, as it is, that he assented to their qualification. The carrier is in the exercise of a public duty, a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. The owner of the goods, by entering into an express contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no other responsibility than that of an ordinary bailee for hire.[3] This view of the subject is, in this country, well sustained by authority.

§ 238. The point which was expressly decided, upon great deliberation, in Hollister *v.* Nowlen, in New York, at the May Term of the Supreme Court, 1838,[4] was, that stage-coach proprietors, and other common carriers, could not restrict their Common Law liability by a general notice, that

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1 Jeremy on Carr. 35, 36; Hollister *v.* Nowlen, Appx. p. xviii.; Cole *v.* Goodwin, Appx. p. xxxiii.

2 See opinion of Nelson, J., in New Jersey Steam Navigation Company *v.* Merchants Bank, Dec. Term Sup. Co. U. S. 1847, Appx. p. liv.

3 *Ante*, Chap. III.

4 Appx. p. xviii.

the "*Baggage of Passengers is at the Risk of the Owners.*" The same point was decided at the same term of the Court in Cole *v.* Goodwin,[1] in which the whole doctrine of notices generally is elaborately and learnedly discussed by Mr. Justice Cowen, and in which the English decisions upon the subject of notices in general, are carefully reviewed by that learned Judge;[2] and the opinion of the learned Judge may be interpreted as going even to the extent, that a common carrier cannot exclude his Common Law liability by an *express contract*, as will appear by the following section.

§ 239. The decision in the case of Gould *v.* Hill, in New York, in 1842,[3] is, that common carriers cannot limit their liability, or evade the consequences of a breach of their legal duties as such, by an *express agreement.* And, accordingly, the Court decided, that where common carriers, on receiving goods for transportation, gave the owner a memorandum, by which they promised to forward the goods to their place of destination, "danger of *fire*, &c. excepted," they were liable for a loss by fire, though not resulting from negligence. The opinion of the Court was delivered by

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[1] Appx. p. xxxiii.

[2] In the case of Camden and Amboy Railroad and Transportation Company *v.* Belknap, 21 Wend. R. 354, the defendant brought an action on the case in the Court below, (the Superior Court of the City of New York,) against the company as common carriers for the loss of baggage. The Chief Justice in the Court below charged the jury, that notice limiting the liability of the defendants, if it reached the plaintiff or came to his knowledge, controlled the Common Law. But in error, in the Supreme Court of the State, Bronson, J., in delivering the opinion of the Court, said: — "The case was tried before we had *formally refused* to engraft upon our code the *modern English innovation* of allowing the carrier to limit his Common Law liability, by a notice brought home to the employer." In Clark *v.* Faxton, 21 Wend. R. 153, it was held the same as in Hollister *v.* Nowlen, and Cole *v.* Goodwin.

[3] Gould *v.* Hill, 2 Hill, (N. Y.) R. 623.

Cowen, J., who said, he should do little more than refer to the case of Cole *v.* Goodwin, and the reasons for such opinion as stated in that case. He then proceeded to say: "It was to the effect, that I could no more regard a special acceptance as operating to take from the duty of a common carrier, than a general one. I collect what would be a contract from both instances, provided it be lawful for the carrier to insist on it; and such is the construction which has been given to both by all the Courts. The only difference lies in the different kinds of evidence by which the contract is made out. When the jury have found, that the goods were delivered with intent to abide the terms of the general notice, I understand a contract to be as effectually fastened upon the bailor, as if he had reduced it to writing. Indeed, the contrary construction would, I think, be to tolerate a fraud on the part of the bailor. The true ground for repudiating the general notice, is, therefore, its being against public policy; and this ground goes not only to the evidence — the mode in which you are to prove the assent — but to the contract itself. After forbidding the carrier to impose it under the form of a general notice, therefore, we cannot consistently allow him to do the same thing in the form of a special notice or receipt. The consequences to the public would be the same, whether we allow one form or the other." [1]

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[1] The reasoning of Chief Justice Gibson, in Atwood *v.* Reliance Trans. Co. 9 Watts, (Penn.) R. 87, was much to the same effect, though the question was not decided. In 1849 it was considered by Bronson, J., in giving the opinion of the Court of Appeals in New York, still a debatable question, whether common carriers and innkeepers can contract for a more restricted responsibility than the law imposes upon them. Wells *v.* Steam Navigation Co., 2 Comst. (N. Y.) R. 204. Of course there is no room to doubt that other bailees may contract (private carriers for example) for a more restricted responsibility than would be implied against them in the absence of a special contract: and so, in that manner they may become insurers against all possible hazards. Ibid. And see *ante*, § 59. The following important intelligence appeared in the Boston Daily

§ 240. In Ohio, the question whether a common carrier could limit his Common Law responsibility by notice, was first brought before the Supreme Court of that State in 1840, on a special verdict, in the case of Jones *v.* Voorhees,[1] and the Court, upon great deliberation, held, and in their opinion delivered by Wood, J., earnestly insisted, that the proprietors of stage-coaches cannot limit their responsibility as common carriers, by *actual* notice to a traveller, that the baggage is at "his own risk."

§ 241. The doctrine, as above established in New York, and in Ohio, is defended by an elaborate opinion of the Supreme Court of Georgia, which was delivered by Nisbet, J., who says: "I have said that a common carrier cannot vary his liability as it existed at Common Law in 1776, by notice or special acceptance. On account of the importance of this subject, I propose to give it a more minute exposition. This is an age of railroads, steamboat companies, stage companies, locomotion and transportation. It is an era of stir — men and goods run to and fro, and common carriers are multiplied. The convenience of the people and safety of property depend more now, I apprehend, upon the rules which regulate the liability of these public ministers, than

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Advertiser about the first of October, 1850, and was copied from the New York Express. "The General Term of the Court of Common Pleas has decided that a common carrier has a right to make a special contract with those sending goods by him, a rule, the contrary to which has usually hitherto been held. The Merchants' Mutual Insurance Company, insured goods for a party at the west, which were placed on board a barge belonging to the Western Transportation Company, and burnt at the great fire at Albany, while on their way. The Iusurance Company paid the loss and sued the Transportation Company, contending they were bound to deliver the goods at the place of destination. The printed receipts of the Transportation Company expressly proved that they will not be liable for loss by fire. The Court holds that said clause is good and valid, and gave judgment for the Transportation Company, no negligence having been shown on their part."

[1] Jones *v.* Voorhees, 10 Ohio R. 145.

at any other period of the world's history. Steam, as a transporting power, has supplanted almost all other agencies, and it is used for the most part by public companies or associations. It is very important that their liability should not only be accurately defined, but publicly declared. Anterior to 1776, the common carrier was an insurer for the delivery of goods intrusted to him, and liable for losses occasioned by *all causes*, except the act of God and the king's enemies, and without the power to limit his responsibility. That this was the law, is proven by the numerous authorities which I have before referred to. No adjudication, before that time, had relaxed its stringent but salutary severity." The learned Judge referred to the case of Forward *v.* Pittard, in 1785, as the first case in which the doctrine of notice was recognized, according to Mr. J. Burrough, in Smith *v.* Horne, and to the case of Nicholson *v.* Williams, in 1804,[1] when it was finally settled by judicial decision; and, referring to the decisions in New York and Ohio, he further observed: — "We adhere then to the sound principles of the Common Law, sustained by the Courts of our own Union, and hold notices, receipts, and contracts, in restriction of the liability of a common carrier, as known and enforced in 1776, void, because *they contravene the policy of law*."[2]

§ 242. In Hale *v.* The New Jersey Steam Navigation Company, in Connecticut,[3] it was held, that where a steamboat was in the business of transporting goods from New York to Providence; and the goods were lost in Long Island Sound, near Huntingdon, Long Island; the contract of the parties was to be governed by the law of New York; and that by the law of New York, common carriers, could not, by a public notice, restrict the liability imposed upon them by the Common Law.

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[1] See *ante*, § 232.

[2] Fish, &c. *v.* Ross, 2 Kell. (Geo.) R. 349.

[3] Hale *v.* New Jersey Steam Navigation Company, 15 Conn. R. 539.

§ 243. The doctrine established in the above States, that common carriers cannot exclude their Common Law responsibility by a general notice to that effect, or by a notice that the property is at the "risk of the owners," was recognized by the Court in Bennett *v.* Dutton, in New Hampshire;[1] and in Massachusetts, there is no disposition to relax the requisitions of the doctrine of the Common Law, as applied to common carriers, nor to give countenance to ingenious devices, by which its provisions may be evaded.[2] There is also a like indisposition to favor or extend the indulgence of notices in Maine.[3] The question in Prentiss *v.* Barney, in Maryland,[4] was left undecided. In Pennsylvania there are numerous and strong *dicta* against the expediency of allowing any limitation of the carrier's liability.[5] "Notwithstanding," says C. J. Gibson, "the unfortunate direction given to the decisions of an early day, it is still almost susceptible of a doubt, whether an agreement to lessen the Common Law measure of a carrier's responsibility, like an agreement to forego a fee-simple tenant's right of alienation, or a mortgagor's right of redemption, is not void by the policy of the law. Though (said he) it is perhaps too late to say, that a carrier may not accept his charge in special terms, it is not too late to say, that the policy which dictated the rule of the Common Law, requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them."[6]

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[1] Bennett *v.* Dutton, 10 N. Hamp. R. 487.

[2] Per Hubbard, J., in Thomas *v.* Boston and Providence Railroad Corporation, 10 Met. (Mass.) R. 479.

[3] Per Weston, C. J., in Bean *v.* Green, 3 Fairf. (Me.) R. 422.

[4] Prentiss *v.* Barney, 4 H. & Johns. (Md.) R. 317.

[5] Beekman *v.* Shouse, 5 Rawle, (Penn.) R. 179; Eagle *v.* White, 6 Whart. (Penn.) R. 505.

[6] Atwood *v.* Reliance Trans. Co. 9 Watts, (Penn.) R. 87. In Bingham *v.* Rogers, 6 Watts & S. (Penn.) R. 495, it seems to be admitted rather reluctantly, on the authority of Beekman *v.* Shouse, that carriers by land may by *special contract* limit their responsibility, though in the

§ 244. Finally, that a common carrier cannot exempt himself from the responsibility, or from the duties which the law has annexed to his employment, by a notice published by the carrier, was very lately declared by the Supreme Court of the United States, in the case of the New Jersey Steam Navigation Company *v.* The Merchants Bank.[1] The Court, in this case, gave their assent to the law as laid down by the Court in Hollister *v.* Nowlen, in New York;[2] and

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Court below, the jury were instructed that common carriers could not, by notice, limit their liability as to the safety of the property, though they might by notice, brought home to the owner, require the latter to state the nature or value of the property, or might for that purpose make a special acceptance; but they could not by notice rid themselves of the duty imposed by law to be answerable for the property, unless the loss accrue by inevitable accident.

[1] New Jersey Steam Navigation Company *v.* Merchants Bank, Dec. Term of Sup. Co. of U. States, 1847, Appx. p. liv.

[2] Appx. p. xviii. The Courts in South Carolina appear inclined to give effect to notices, which claim to exonerate a common carrier from his Common Law liability. *Ante*, § 159, 224. In the case of Singleton *v.* Hilliard, &c., in 1847, in the Court of Appeals of South Carolina, Strob. (S. C.) R. 203, in which the action was to recover damages for the loss of a large number of bales of cotton, that were consumed by fire on the defendants' steamboat, the general legal proposition of the appellants was, that the ship-owners, Hilliard & Brooks, were exempt from their liability at Common Law, for the accidental loss by fire, by reason of the express notice, that they were not to be held liable for such losses by fire, unless upon payment of certain specified and additional freight. The notice in question, and duly signed by the agent, was a follows: — "*Steamboat notice.*— The proprietors of the steamboat line plying from Camden and Columbia to Charleston, having made arrangements with the Augusta Insurance and Banking Company, to insure all cotton shipped by their boats from the above places, inform their friends and the public generally, that bills of lading for cotton will be given by the agents at Camden and Columbia, free of all risks, both from fire, and the navigation, without additional charge." Richardson, J., who gave the opinion of the Court, in reference to this notice, said: — "From this advertisement in a Camden paper, I cannot conceive that any one could understand, that the shipper had to pay twelve and a half cents on each bale, in order to render the owners of the steamboats liable for losses by fire." Another fact the learned Judge mentioned as worthy of notice, which was, the uncertainty of a knowledge

they say: "We lay out of the case the *notices* published by the respondents, seeking to limit their responsibility; because the carrier cannot in *this way* exonerate himself from duties which the law has annexed to his employment." The American Reports, therefore, afford additional testimony of the truth of the assertion made by Burrough, J., in Duff *v.* Budd,[1] viz. that "carriers are constantly endeavoring to narrow their responsibility, and to creep out of their duties; and I am not singular in thinking that their endeavors ought not to be favored."

§ 245. Thus, in the words of an eminent legal writer, "the right of a common carrier, by a general notice, to *limit*, *restrict*, or *avoid* the *liability* devolved on him by the Common Law, on the most salutary grounds of public policy, has been denied in American Courts, after the most elaborate consideration."[2] At the same time, as the learned writer above referred to says, "it is now well settled, that a common carrier may *qualify his liability*, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly."[3] Notwithstand-

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on the part of the shippers and their agents, of the advertisement in question in the public papers; and, in short, the Court considered the case, "that of a man shipping his cotton on a steamboat, paying customary freight, which cotton has been destroyed in the boat by fire, and the owner of course liable."

[1] Duff *v.* Budd, 3 B. & Bing. R. 177.

[2] 2 Greenleaf, Ev. § 215.

[3] Ibid., *Ante*, § 235, Kent, Comm. 606, 607; Story on Bailm. § 557. In Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 115, the Court, by Nelson, J., say, that "if he" (the carrier) "has given general notice, that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid,

ing such notice, the owner of the goods has a right to insist, that the carrier shall receive the goods subject to all the responsibilities incident to his employment.[1]

§ 246. If the carrier has published two different notices, each of which is before the public at the time of the carriage, that will bind him which is least beneficial to himself; and if, at the time of the carriage, he delivers a written notice without any limitation of responsibility, that nullifies his prior notice containing a limitation.[2]

§ 247. In all cases where the notice cannot be brought home to the person interested in the goods, directly or constructively, it is a mere nullity; and *the burden of proof* is on the carrier to show, that the person with whom he deals, is fully informed of the terms and effect of the notice.[3] When the notice is thus brought home, in the absence of all contravening circumstances, it is deemed proof of the contract between the parties; and is then to be construed like every other written contract; and, so far as the exceptions extend, they convert the general law into a *qualified* responsibility.[4]

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such notice, if brought home to the knowledge of the owner, is as effectual in qualifying the acceptance of the goods, as a special agreement, and the owner, at his peril, must disclose the value, and pay the premium; and the carrier, in such case, is not bound to make the inquiry." The only modification which the Supreme Court of Georgia would admit, of the rule of responsibility of a common carrier at Common Law, by a general notice, is as above stated in the text. Fish, &c. *v.* Ross, 2 Kell. (Geo.) R. 349. See also the modern English case of Wyld *v.* Pickford, 8 M. & Welsb. R. 442, and the earlier English cases referred to in Hollister *v.* Nowlen, Appx. p. xviii., Cole *v.* Goodwin, Appx. p. xxxiii. And see *Ante*, § 234.

[1] See Hollister *v.* Nowlen, Appx. p. xviii.

[2] Munn *v.* Baker, 2 Stark. R. 255; Cobden *v.* Bolton, 2 Campb. R. 108.

[3] Story on Bailm. § 560; 2 Greenl. Ev. § 216; Hollister *v.* Nowlen, Appx. xviii.; Brooke *v.* Pickwick, 4 Bing. R. 218; Beekman *v.* Shouse, 5 Rawle, (Penn.) R. 189.

[4] Ibid.

§ 248. The most usual evidence to show that the plaintiff has had notice of the defendant's terms, has been by proof that a notice was *put up in the office* where the goods were received and entered for the purpose of carriage, in so conspicuous a situation, that it must (unless he were guilty of *wilful negligence*) have attracted the attention of the plaintiff or his agent;[1] and the printed conditions of a line of public coaches were held to be made sufficiently known to passengers, by being posted up at the place where they book their names.[2] But this proof fails where the party who delivers the goods at the office cannot read;[3] and where the goods were delivered by a porter, who admitted, that he had frequently been at the defendant's office, and that he had seen a printed board, but did not suppose that it contained any thing material, and in fact, had never read it, it was held, that, although the board in fact contained a notice, the evidence of notice was insufficient; and that it was incumbent on a party who wished to rid himself of his Common Law responsibility, to give effectual notice.[4] So there was a failure of proof where the notice, at the office at Cheltenham, stated the advantage of carriage by the particular wagon, in large letters, and the notice of non-responsibility, in small characters,[5] although at the terminus of the carrier's route, notice was given at the office by means of a board inscribed with large letters. So also where goods are not delivered at the office where the notice is exhibited, but are delivered into a cart sent round to receive goods;[6] or, at an intermediate stage between the two places, from each of which the carrier conveys goods to the other, if there be no notice

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[1] 2 Stark. Ev. 338.
[2] Whitesell *v.* Crane, 8 Watts & S. (Penn.) R. 369.
[3] Davis *v.* Willan, 2 Stark. R. 279.
[4] Kerr *v.* Willan, 2 Stark. R. 53.
[5] Butler *v.* Hearne, 2 Campb. R. 415.
[6] Clayton *v.* Hunt, 3 Campb. R. 27.

at the place of delivery; although notices are suspended at the two termini.[1]

§ 249. Another usual mode of proof of notice, is by evidence, that the notice was given by *printed cards*, or by *advertisements in the public newspapers;* but this is insufficient, unless it be proved that the plaintiff has seen such cards, or read the newspapers;[2] or is accustomed to read the newspapers, so as to lay a foundation for presuming knowledge.[3] If the carrier relies on the distribution of *printed handbills*, he must show, that one of them was actually delivered to the owner, or to the person bringing the goods for conveyance.[4]

§ 250. It was said by Best, J., in Brooke *v.* Pickwick,[5] "If coach proprietors wish honestly to limit their responsibility they ought to announce their terms to every individual who applies at their office, and, at the same time, place in his hands a printed paper specifying the precise extent of their engagement. If they omit to do this, they attract customers, under the confidence inspired by the extensive liability which the Common Law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them." This course received the full approbation of the Court, by Bronson, J., in Hollis-

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1 Grugen *v.* Jolly, 1 Holt's Cas. 317.

2 2 Stark. Ev. 338; Jenkins *v.* Blizard, 1 Stark. R. 418; Clayton *v.* Hunt, *ub. sup.*; Leeson *v.* Holt, 1 Stark. R. 186.

3 Ibid. and Rowley *v.* Horne, 3 Bing. R. 2; Griffith *v.* Lee, 1 C. & Payne, R. 110.

4 Palmer *v.* Grand Junction Railway Company, 4 M. & Welsb. R. 749. Parol evidence is admissible to show the contents of a handbill put up in a stage-office four years before, containing a notification of limited responsibility. Whitesell *v.* Crane, 8 Watts & S. (Penn.) R. 369.

5 Brooke *v.* Pickwick, 4 Bing. R. 218.

ter *v.* Nowlen.[1] The usual practice of railway companies in England, in respect to this subject, is, upon the receipt of the goods, to deliver a *ticket* explaining the terms upon which the company are willing to accept them. Proof of the delivery on the one side, and the acceptance on the other, of such a ticket, is sufficient to constitute a special contract; but if there is no proof of the production and delivery of the ticket to the other party, the ground of exemption fails, and the company consequently must be taken to stand on the ordinary footing of carriers at Common Law.[2]

§ 251. A notice known to the owner of the goods, binds him, in respect to all his *agents*, who send goods by the same carrier.[3] And on the other hand, a notice known to the *porter*, *messenger*, or *agent* of the owner of the goods, is notice to him, notwithstanding the owner is personally ignorant of such notice;[4] for indeed, the maxim, that the principal is civilly bound by the acts of his agents, universally prevails, both in Courts of Law and Equity;[5] it being taken for granted, that the principal knows whatever the agent knows.[6] But a knowledge of notice by a postmaster, to whom a trunk is delivered by the plaintiff's servant, to be by him delivered to a stage-driver, will not affect the owner of the trunk, if the knowledge has not been communicated to him, or to his agent or servant, by the postmaster.[7]

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[1] Appx. p. xviii.

[2] Walf. Sum. of Laws of Railways, 308.

[3] Story on Bailm. § 558; Mayhew *v.* Eames, 3 B. & Cress. R. 691; Maving *v.* Todd, 1 Stark. R. 72; Clark *v.* Hutchins, 14 East. R. 475.

[4] Ibid.; Bean *v.* Green, 3 Fairf. (Me.) R. 422; Baldwin *v.* Collins, 9 Rob. (Louis.) R. 468; New Jersey Steam Navigation Company *v.* Merchants Bank, Dec. Term Sup. Co. U. States, 1847, Appx. p. liv.; and see *ante*, § 91, 98.

[5] As per Lord Kenyon, C. J., in Doe *v.* Martin, 4 T. R. 66.

[6] As per Ashhurst, J., in Fitzherbert *v.* Mather, 1 T. R. 16. And see also Anderson *v.* Highland Turn. Co. 16 Johns. (N. Y.) R. 88.

[7] Bean *v.* Green, 3 Fairf. (Me.) R. 422.

§ 252. Where several persons are carriers as partners, and publish a notice, and one of the partners afterwards undertakes, without any communication with, or knowledge of, the others, to carry packages for a particular person free of expense, it seems,[1] that such a contract is not binding on the partnership, in derogation of their notice; that is, if such act is not within the scope of his authority, or is done by connivance in fraud of their rights.[2]

§ 253. Had carriers, by a general consent, adopted one certain approved legal form of notice, to qualify their responsibility in extraordinary cases, few rules of *construction of notices* would have been necessary, and few difficulties would have arisen in determining when the circumstances of any case came within the general rules of exception. But as carriers have in general adopted each a peculiar form of notice, the cases have been decided in reference only to, and upon a construction of, such particular notices. Hence, it has seldom happened in England, that one case affords a parallel or precedent for another, which arises upon a differently-worded limitation.[3] In one case, where the terms of the contract were, that "cash, plate, jewels, &c. would not be accounted for, if lost, of more than £5 value, unless entered as such, and paid for," the carrier was not held liable for any loss whatever, in case the goods exceeded the specified value, and no entry or payment of the increased value had been made.[4] In another case, where the terms of the notice were, that "no more than £5 will be accounted for, for any goods or parcels delivered at this office, unless

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1 Story on Bailm. § 559.

2 Bignold *v.* Waterhouse, 1 M. & Sel. R. 255; Helsby *v.* Mears, 5 B. & Cress. R. 504.

3 See Jeremy on Carr. 45; and Hollister *v.* Nowlen, Appx. p. xviii., and Cole *v.* Goodwin, Appx. p. xxxiii.; and *Ante*, § 234.

4 Clay *v.* Willan, 1 H. Bl. R. 298; and see Hutton *v.* Bolton, there cited.

entered as such, and paid for accordingly," the plaintiff was allowed to retain his verdict for £5, as a limited amount of damages recoverable by him under the conditions of this contract.[1]

§ 254. It is very obvious, as has been truly said, that "it is of great practical importance, to carriers, to fix the terms of their notices in such a manner, as to avoid *all ambiguity;* as, in all cases of doubt, they will be construed unfavorably to the carrier."[2] Where the notice of a stage company related solely to the baggage of passengers, it was contended, that the notice extended not only to the baggage, but included also goods and merchandise under the superintendence of the carrier, but the Court refused to accede to such a construction; and they said, that if the defendants wished to be understood, as they insisted, it was certainly not unreasonable to require something more explicit, and less liable to *ambiguity*, than what the notice on which they relied contained.[3]

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[1] Clarke *v.* Grey, 6 East, R. 564.

[2] Jeremy on Carr. 47; and see Story on Bailm. § 556.

[3] Beekman *v.* Shouse, 5 Rawle, (Penn.) R. 179. An action was brought against common carriers, being the proprietors of a line of stage-coaches running between Baltimore and Philadelphia, for the transportation of passengers and goods and merchandise for hire, for negligence in not delivering a case of sinshaws, delivered by the plaintiff at the stage-office, and entered on the way-bill for transportation. The defendant had published in the various newspapers printed in B. (and which advertisement was known to the plaintiff) the time when the stages would start from, and arrive at, the respective cities, and the publication contained also these clauses: "Fare and allowance of baggage as usual. All baggage at the risk of the owners thereof." "All the baggage over twenty pounds will hereafter positively be charged, and be at the risk of the owners thereof." It was held, that if the owners of stage-coaches, which carry not only passengers and their baggage, but goods which the owner does not accompany, can by their publications exempt themselves from their liability, *which the Court did not mean to decide*, then such publications should, in that respect, be plain and explicit. That in this

§ 255. A general inclination of the public to avoid their subjection to extortion by the power allowed to carriers of thus fixing the additional premium on valuable goods, and a consequent general neglect to give the information required, carriers, instead of being what they originally were intended, proved arbitrary extortioners, and successful evaders of the Common Law policy. The interests of commerce demanded the legal enforcement of some gradual scale of price, proportionate to the value or bulk of the articles; and thereby control the power which carriers had assumed.[1] These considerations, together with that of the difficulty of proving the notice to have come to the knowledge of the other party, at length induced the English Parliament to interfere, by the statute 11 Geo. IV. and 1 Wm. IV. c. 68; a statute which has, to some extent, as relates to carriers by land, restored the operation of the Common Law.[2] By thus substantially re-asserting the rule of the Common Law, it has been considered, that relief has been afforded both to the Courts and to the public; and that, if the people of Great Britain, "after a long course of legal controversy, have retraced their steps, and returned to the simplicity and certainty of the Common Law rule, we (in this country) ought to profit by their experience." [3]

§ 256. The statute above referred to, (the adoption of the provisions of which is so decidedly recommended,) is entitled, "An Act for the more effectual protection of mail contractors, stage-coach proprietors, and other common carriers for hire,

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case, the defendants' advertisement was in *doubtful* and *ambiguous* language, and that they were as responsible for the loss of the goods, as if no advertisement had been published by them. Barney *v.* Prentiss, 4 H. & Johns. (Md.) R. 317; and Dwight *v.* Brewster, 1 Pick. (Mass.) R. 50.

[1] Jeremy on Carr. 41.

[2] Story on Bailm. § 554.

[3] Bronson, J., in giving the opinion of the Court in Hollister *v.* Nowlen, Appx. p. xviii.

against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof." It recites that "by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, wagons, vans, and other public conveyances by land, for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased; and that, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledges of notices, published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses;" it is therefore enacted in section 1, that no mail contractor, stage-coach proprietor, *or other common carriers by land* for hire, shall be liable for the loss of or injury to any article or property of the description following; that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or

lace; or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles or property contained in such parcel or package shall *exceed the sum of ten pounds;* unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared[1] by the person sending or delivering the same, and such increased charge as is hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package. The *second* section enacts, that when any parcel or package

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[1] The following *alphabetical* list of the above articles may be found useful:

Bank notes. Bills of exchange. Checks on bankers. China.

Clocks. Coin (gold or silver) of this country, of a foreign state.

Deeds. Engravings. Foreign coins (gold or silver.)

Furs. Glass.

Gold coin, or other gold, (manufactured or not,) or gold plate, or plated articles.

Jewelry. Lace. Maps.

Money (coins) or orders, notes, or securities for payment of money.

Notes of banks of England, Scotland, or Ireland, or other bank in Great Britain or Ireland, or notes for payment of money.

Orders for payment of money.

Paintings. Pictures. Plate (gold or silver.)

Plated articles. Precious stones. Promissory notes.

Securities for payment of money.

Silks in a manufactured or unmanufactured state, or wrought up, or not with other articles.

Silver, silver coin, or silver plate, or plated articles.

Stamps (English or foreign.) Stones (precious.)

Times-pieces of any description.

Title-deeds. Trinkets. Watches. Writings.

containing any of the said articles shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house, when such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons, sending or delivering parcels or packages containing such valuable articles at such office, shall be bound by such notice, without further proof of the same having come to their knowledge. By the *third* section, when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured (which receipt shall not be liable to any stamp duty); and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier, as aforesaid, shall not be entitled to any benefit or advantage under the act; but shall be liable as at the Common Law, and be liable to refund the increased rate of charge. The *fourth* section provides, that no public notice or declaration shall limit or in anywise affect the liability at Common Law of any of such mail contractors, stage-coach proprietors, or other public common carriers, for or in respect of any goods to be carried and conveyed by them; but that they shall be liable as at the Common Law, to answer for the loss of, or injury to, any articles and goods, in respect whereof they may not be entitled to the benefit of

the act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding. Section *sixth* provides, that nothing in the act contained shall extend or be construed to annul or in anywise affect any *special contract* between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods. By the *seventh* section, it is enacted, that where any parcel or package shall have been delivered at any such office, and the value and contents declared, and the increased rate of charges been paid, and such parcel or package shall have been lost or damaged, the party entitled to recover damages in respect thereof shall also be entitled to recover back such increased charges in addition to the value of such parcel or package. The *eighth* section provides, that nothing in the act shall protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant, in his employ, nor protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his own personal neglect or misconduct. By the *ninth* section, such mail contractors, stage-coach proprietors, or other common carriers for hire, are not to be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require from the plaintiff proof of the actual value of the contents by the ordinary legal evidence; and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges.

§ 257. In regard to the general effect of the above act, 1st, it relates solely to carriers by land; 2dly, it extends to the particular articles enumerated only in case their aggre-

gate value exceeds 10*l.*; 3dly, that it exempts the carrier from his Common Law responsibility as to such goods (unless the loss arise from the felony of his servants) only in the event of his affixing a public and conspicuous notice in the receiving office, notifying the extra charges for carrying such valuable articles, or in the event of a special contract; 4thly, that if the notice be affixed, although not seen by the consignor or owner, the carrier is not responsible as to the enumerated description of goods, (if the loss do not arise from the felony of his servants,) unless the value and nature of the goods be made known, and the increased or insurance rate of charge for carriage, or an agreement to pay it, be accepted by the carrier; but the refusal to give on demand a receipt for the goods and extra charge, deprives him of the protection of the act. 5thly, That as to all goods not specifically mentioned in the act, and as to goods of the description therein mentioned, when the value of the latter is not above 10*l.*, the Common Law liability remains, although such notice be given, or any public notice or declaration be made or given, by the carrier attempting to vary such liability; 6thly, that the act does not preclude the parties from entering into a *special contract* as to the conveyance of goods of any description or value; and under the act, the merely giving the public notice, though known to the consignor or owner of the goods, cannot be deemed to constitute a special contract for this purpose; and 7thly, it seems, that if the loss or injury be occasioned by the personal neglect or misconduct of the coachman, guard, book-keeper, or other servant of the carrier, in a case in which the carrier himself is not responsible, such coachman, &c. may be sued by the owner of the goods for the consequent damage.[1]

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[1] Chit. on Contr. 493. For an analysis of this statute, by Bronson, J., see Appx. xxxi. xxxii. As to the special plea, under it, in Boys *v.* Pink, 8 Carr. & Payne, R. 561, the declaration stated, that the defendants were common carriers of goods by a van from Bristol to London, and that they so being such carriers, received from the plaintiff a box containing certain

§ 258. In further considering the subject of notices, it becomes proper to consider the effect of *misrepresentation*, *fraud*, and *concealment* of the owner of the goods, in respect to the nature, amount, and value of them. It is plainly the duty of every person sending goods by a common carrier, in the absence of notice, not to practise such imposition and

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goods, to wit, prints and colored prints to be safely carried by the defendants from Bristol to London, and that the defendants, not regarding their duty, did not convey the goods safely, but, on the contrary, so negligently conducted themselves, that the goods were spoiled. Pleas — first, Not guilty; and second, a special plea *founded on the statute:* "And for further plea, the defendants say, that the said prints and colored prints in the said declaration mentioned, at the time of the said delivery thereof to the defendants, were engravings, and that the said delivery in the declaration mentioned, of the said box, containing the said goods and chattels, was a delivery thereof to the defendants as common carriers by land of goods for hire, to a certain servant of the defendants, and at a certain office and receiving house of the defendants, situate at Bristol aforesaid, and that the value of the goods and chattels contained in the said box, at the time of the said delivery thereof as aforesaid, exceeded the sum of ten pounds, and amounted, to wit, to the said sum of two hundred pounds, in the said declaration mentioned. And the defendants further say, that at the time of the said delivery of the said box and its contents as aforesaid, for the purpose of their being carried as aforesaid, the value and nature of the said goods and chattels were not declared by the plaintiff or the person sending or delivering the same, nor was such increased charge as is hereinafter mentioned, nor any engagement to pay the same, accepted by the defendants, or either of them, or the person receiving the said box and its contents as aforesaid; and the defendants further say, that before the time when the said box and its contents aforesaid were so delivered to, and received by, the defendants as such carriers as aforesaid, the defendants had caused to be affixed, in the said office and receiving house, according to the *form of the statute* in such case made and provided, in legible characters, in a public and conspicuous part of the said office and receiving house, a notice, whereby they, the defendants, stated and notified that certain increased rates of charge, therein mentioned, specified, and stated, were required to be paid, over and above the ordinary rate of carriage, as a compensation for the greater trouble and care to be taken for the safe conveyance of a parcel or package containing engravings of a value exceeding ten pounds, and this the defendants are ready to verify."

deception upon him as will add to his risk and lessen his requisite care and diligence; and any false statement or unfair concealment, or material suppression of facts, whereby the carrier is misled, will exempt him from the responsibility of a common carrier.[1] "In the absence of notice," says Mr. J. Nelson, "if any means are used to conceal the nature of the article, and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness, and its consequence to the carrier, upon the principles of common justice, will exempt him from responsibility; for such a result is alike due to the carrier, who has received no reward for the risk, and to the party who has been the cause of it, by means of disingenuousness and unfair dealing."[2]

§ 259. Whenever the owner of a package represents the contents of it to the carrier, to be of a particular value, he will not be permitted, in case of a loss, to recover from the carrier, at the most, any amount beyond that value.[3] Where a carrier received two bags of money sealed up, and he was told that they contained £200, and a receipt was given, charging 10*s.* per cent. for carriage and risk, and the bags of which the carrier was robbed contained £400, it was held, that the plaintiff could not recover more than £200;[4] and it may be doubted whether the defendant would now be considered as liable even to that extent, and whether the whole contract would not be considered as avoided, and rendered a nullity, by the fraudulent representation.[5]

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[1] 2 Kent, Comm. 603, 604; Story on Bailm. § 565; Edwards *v.* Sherratt, 1 East, R. 604; Batson *v.* Donovan, 4 B. & Ald. R. 21; Titchburne *v.* White, 1 Str. R. 145; Relf *v.* Rapp, 3 Watts & S. (Penn.) R. 21.

[2] Per Nelson, J., in Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 116.

[3] Story on Bailm. § 565; and see the authorities cited, *ante*, to § 258, and Riley *v.* Horne, 5 Bing. R. 217.

[4] Tyler *v.* Morrice, Carth. R. 485.

[5] 2 Stark. Ev. 293, (Eng. ed. 1842); Story on Bailm. § 565; Harris *v.* Packwood, 3 Taunt. R. 264; Bull. N. P. 71. See also cases cited in

§ 260. There is another old case, which turned on the doctrine of unfair representation by the owner of the property, and which has been often cited by the Courts, and is introduced by Story, in his very learned and valuable work on Bailments.[1] It was an action on the case, brought against a country carrier for not delivering a box with goods and money in it. The evidence was, that the plaintiff delivered the box to the carrier's porter, whom he appointed to receive goods for him, and told the porter that there was a book and tobacco in the box, when, in fact, there was £100 besides in the box. It was agreed by the counsel, and given in charge to the jury, that if a box, with money in it, be delivered to a carrier, he is bound to answer for it, if he be robbed, although it was not told him what was in it. But Lord Chief Justice Rolle directed the jury, that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it, for he need not tell the carrier all the particulars in the box; but it must come on the carrier's part to make a special acceptance. But, in respect of the intended cheat to the carrier, he told the jury they might consider him in damages; notwithstanding which, the jury gave £97 against the carrier for the money only, (the other things being of no considerable value,) abating only £3 for carriage.[2] There may well be a difficulty in accounting for the finding of the jury in this case.[3]

Hollister *v.* Nowlen, Appx. p. xviii., and Cole *v.* Goodwin, Appx. p. xxxiii.

[1] Story on Bailm. § 565 *a*.

[2] Kenrig *v.* Eggleston, Aleyn, R. 93.

[3] The Reporter has added, "*quod durum videbatur circumstantibus.*" The remark of the Reporter, says Story, (Bailm. § 565 *a*,) "seems well founded; and it is difficult to account for the verdict of the jury, unless upon the supposition, that they were of opinion, that there was some fraud in the carrier." Lord Mansfield, speaking of the Reporter's note, said upon one occasion: "Now I own, that I should have thought this a fraud, and I should have agreed in opinion with the *circumstantibus.*" Gibbon *v.* Paynton, 4 Burr. R. 2301.

§ 261. It is well established, that the owner of the goods, or the person delivering them, must take care not to do or say any thing which shall tend to mislead the carrier in respect to the requisite care to be taken of them.[1] If the owner adopts a disguise for his box which is calculated to prevent the carrier from taking the particular care of it which the real nature and value of its contents demand, he cannot recover in case of loss, even in the case of gross negligence, beyond the value of the box itself;[2] as, for example, by labelling a box or a trunk, as containing articles of a different nature and inferior value from what are its real contents.[3]

§ 262. The case of Orange County Bank *v.* Brown, in New York,[4] which has been already noticed,[5] is in accordance with the incontrovertible principle, that no person has a right, by practising concealment or fraud, to impose a duty upon another, which he would not, if acting advisedly, have undertaken. That was a case, in which a traveller's trunk contained $11,250, and the plaintiff sought to recover it as a part of the *baggage* lost. The Court held, that it did not fall within the commonly received import of the term "baggage;" and that an attempt to have it carried free of reward, under cover of "baggage," was an imposition upon the carrier; that he was thereby deprived of his just compensation, besides being subjected to unknown hazards. The principle of this case was applied in the case of Pardee *v.* Drew, in the same State,[6] in which it was held, that a carrier was not liable for

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[1] 2 Kent, Comm. 602, 603, 604. See also Hollister *v.* Nowlen, Appx. p. xviii., and Cole *v.* Goodwin, Appx. p. xxxiii.

[2] Bradley *v.* Waterhouse, 1 Mood. & Malk. R. 150; and see Story on Bailm. § 77.

[3] Relf *v.* Rapp, 3 Watts & S. (Penn.) R. 21.

[4] Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 85, recognized in Hawkins *v.* Hoffman, 6 Hill, (N. Y.) R. 586.

[5] *Ante*, § 115.

[6] Pardee *v.* Drew, 25 Wend. (N. Y.) R. 85.

the loss of a trunk which contained valuable merchandise, and nothing else. The Court, by Nelson, J., would not say, that the plaintiff intended to impose upon the defendant, and under the cover of "baggage," to obtain the transportation of merchandise free of expense, for that was not material; it was sufficient, that that was the practical effect of his conduct, and that neither the captain of the steamboat or any of the hands on board, could have suspected, that it was a box of costly merchandise, requiring extraordinary attention and care; the defendant was doubly wronged; 1st, deprived of his just reward for carrying the goods; and 2d, prevented from exercising proper precaution against the dangers to which the property may be exposed.

§ 263. Not unlike in principle from the two cases cited in the preceding section is the case of Miles *v.* Cattle.[1] In this case, the plaintiff, a passenger by the defendants' coach, having received a parcel of value from a friend, to be booked and conveyed by the same coach, instead of doing as directed, he placed it in his own bag, which was subsequently lost; being a wrong-doer towards the defendants, the loss was held to be imputable to his own misfeasance, and he could not sue them for the value.

§ 264. Where there is no notice, if there are no improper means, or artifice, adopted by the person who sends the goods, to conceal the nature and value of the contents of the box, parcel or package, to mislead or deceive the carrier, the person sending the goods is not bound to make the disclosure, unless inquiry is made of him on the subject; although the carrier has the right to make the inquiry, and to have a true answer, and if a false answer is given, he will not be responsible.[2] In Jackson *v.* Walker, decided in

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[1] Miles *v.* Cattle, 6 Bing. R.743, and cited *ante*, § 41.

[2] Opinion of Chancellor Walworth, in Sewall *v.* Allen, 6 Wend. (N. Y.) R. 349; Hollister *v.* Nowlen, Appx. p. xviii.; Cole *v.* Goodwin, Appx.

1842, in the English Court of Exchequer,[1] Baron Parke says: "I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, it is the duty of the person receiving it, to ask such questions about it, as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a ground which vitiates the contract altogether."[2] Mr. J. Nelson, in giving the opinion of the Court, in Orange County Bank *v.* Brown, in New York,[3] says: "As a general rule, when there has been no qualified acceptance of the goods by special agreement, or where an agreement is not to be inferred from notice, the carrier is bound to make the inquiry, as to the value of the box or the article delivered to him; and the owner must answer at his peril; and if such inquiries are not made, and it is received for such price for

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p. xxxiii.; Phillips *v.* Earle, 8 Pick. (Mass.) R. 182; 2 Kent, Comm. 603, 604; Story on Bailm. § 567; Brooke *v.* Pickwick, 4 Bing. R. 218; Sleat *v.* Flagg, 5 B. & Ald. R. 342; Batson *v.* Donovan, 4 Ib. 21.

[1] Jackson *v.* Walker, 10 M. & Welsb. R. 168.

[2] In this case, it appeared, that the plaintiff went on board the defendant's steamboat, with his horse and carriage, paying the defendant's charge of a "light four wheeled phaeton;" that *jewelry* and *watches* of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the defendant. The carriage was taken safely across the river, and on the arrival of the boat at the pier head at Liverpool, two of the defendant's servants put the carriage out upon the slip, towards the quay, but in doing so were overpowered by its weight, and it ran down into the river, whereby the jewelry and watches were much injured: It was held, that the plaintiff's right of action for this injury was not affected by his not having communicated the fact of the jewelry and watches being contained in the carriage.

[3] Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 115.

transportation as is asked, with reference to its bulk, weight or external appearance, the carrier is responsible for the loss, whatever may be its value." [1]

§ 265. But, it is not competent to the carrier, in an action against him for negligence, to set up as a defence, under a plea of not guilty, that the owner of the goods misrepresented them; the plea operating only as a denial of the loss or damage, and not of the receipt of the goods by the carrier, who ought either to plead the misrepresentation specially, or traverse the acceptance of the goods for the purpose of being carried.[2]

§ 266. It is said, that it was to obviate the inconvenience of asking questions in every case, and the difficulty of proving the statements made on each occasion, that common carriers, in England, resorted to the expedient of a general notice, that they would not be liable for the loss of money and valuables, unless they were informed of their existence; nor for the loss of ordinary goods and chattels beyond a certain amount, unless the value of such goods was declared and entered at the office, and an increased rate of remuneration paid for their conveyance.[3] But there has been some question as to whether the carrier is not bound to inquire, although he has given notice.[4] The case of Gibbon *v.* Paynton,[5] was among the earliest, if not the very first, of the cases, in which a carrier's notice appears.[6] The defendants in this case, had advertised, that their coachman

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[1] And see the case referred to *ante*, § 115, 262; and see also Hawkins *v.* Hoffman, 6 Hill, (N. Y.) R. 586. Lord Mansfield, in Gibbon *v.* Paynton, does not deny, that mere silence as to the amount, may in general be honest. 4 Burr. R. 2298.

[2] Webb *v.* Page, 6 Scott, New R. 604; and Man. & Gr. R. 196.

[3] Add. on Contr. 814.

[4] Story on Bailm. § 568.

[5] Gibbon *v.* Paynton, 4 Burr. R. 2298.

[6] 9 Geo. 3, Easter Term, 1769.

would not be answerable for money, or jewels, or other valuable goods, unless he had notice that such were delivered to him; and it was probable that the plaintiff knew of the notice, and understood, that, by the course of trade, money was not carried without an extra premium. Yet the plaintiff delivered to the coachman £100 *hid in hay in an old nail bag*. The bag and the hay were carried safely, but the money was lost. It was held, the plaintiff could not recover. Lord Mansfield proceeded entirely independent of the notice; but Yates, J., considered the notice equivalent to a special acceptance, and Aston, J., hinted at the same ground. The Judges, in the case of Batson *v.* Donovan,[1] with the exception of Best, C. J., held, that the effect of the notice is to prevent the necessity of a particular inquiry in each case; and that, in cases of notices, the party who sends the goods, without payment for the extraordinary value, holds them out, impliedly, as articles of ordinary value; and under such circumstances, the contract itself becomes a nullity.[2] But Mr. J. Best was of opinion, that when there is notice, the carrier is bound to inquire, and held that the owner of the goods is not bound to disclose their value unless asked; and to this opinion he has steadily adhered,[3] and so strenuously, that in one case,[4] he said, he must continue to retain his opinion, till the twelve Judges decided he was wrong.[5] In Orange County Bank *v.* Brown,[6] the Court, by Nelson, J., hold, that in case of notice, the carrier is not bound to make the inquiry, and that if the owner omits to make known the value, and does not therefore pay the premium, at the time of

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[1] Batson *v.* Donovan, 4 B. & Ald. R. 21.

[2] See Story on Bailm. § 568.

[3] Sleat *v.* Fagg, 5 B. & Ald. R. 342.

[4] Brooke *v.* Pickwick, 4 Bing. R. 218.

[5] See also Garnett *v.* Willan, 5 B. & Ald. R. 53; Riley *v.* Horne, 5 Bing. R. 217; Bignold *v.* Waterhouse, 1 M. & Sel. R. 261.

[6] Orange County Bank *v.* Brown, 9 Wend. (N. Y.) R. 115.

the delivery, "it is considered as dealing unfairly with the carrier, and he is not liable to the amount mentioned in his notice, or not at all, according to the terms of the notice."[1]

§ 267. As the carrier may set up fraud and imposition on the part of the person sending the goods, the latter, although the former is protected by a general notice, may charge and prove *negligence* in the former; so that, in effect, proof of negligence is an answer to proof of notice.[2] "If the carrier should perchance refuse to carry the stuffe unless promise were made unto him that he should not be charged for any misdemeanor that should be in him, the promise were void; for it were against reason, and against good manners."[3] It cannot therefore be supposed, that the person sending goods, and the carrier who is to convey them, intended to enter into a contract for the letting and hiring, of labor and care,[4] and agreed, at the same time, to dispense with the exercise of such labor and care. "It is impossible," according to Lord Ellenborough, "without outraging common sense, so to construe the notice as to make the carrier say, 'We will receive your goods, but will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious.'"[5] In Newbern *v.* Just,[6] it was affirmed by Best, C. J.: — "It has been decided over and over again, that notice does not protect

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[1] But see Hollister *v.* Nowlen, Appx. p. xviii.; Cole *v.* Goodwin, Appx. p. xxxiii.

[2] 2 Stark. Ev. 291.

[3] Doct. & Stud. Dial. 2, ch. 49; Noy's Max. ch. 43, 92, Best, C. J.; Newbern *v.* Just, 2 C. & Pa. R. 76.

[4] See *ante*, § 1.

[5] Lyon *v.* Mells, 5 East, R. 438. It is evident, that one contracting party cannot impose a condition upon the other, going to the destruction of the thing granted, when, by the well known rule, the thing granted passes freed from the condition. Tindal, C. J., Lucas *v.* Goodwin, 4 Scott, R. 509.

[6] Newbern *v.* Just, 2 C. & Pa. R. 76.

a carrier against negligence." A notice, therefore, applies only to the responsibility of the carrier as an INSURER, and does not exempt him from the consequences of his own negligence, or from the negligence of his servants and agents. Neither by public notice seen and read by his employer, nor even by special agreement, can the carrier exonerate himself from the consequences of gross neglect.[1]

§ 268. What constitutes gross neglect or gross negligence, in these and other cases, and whether there is any real distinction between negligence and gross negligence, as we have already shown, has been a matter of judicial doubt; and that the distinction could not, with precision, be stated.[2] In Wyld *v.* Pickford,[3] Mr. Baron Parke says; "The weight of authority seems to be in favor of the doctrine, that, in order to render a carrier liable after notice, it is not necessary to prove an abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence." Again, "he," (the carrier, notwithstanding the notice,) "undertakes to carry from one place to another, and for some reward in respect of the carriage, and is, therefore, bound to use ordinary care in the custody of the goods." This case has been considered as putting at rest any further question on the subject, it being entirely satisfactory in its reasoning; so that, in cases of

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[1] Hollister *v.* Nowlen, Appx. p. xviii.; Cole *v.* Goodwin, Appx. p. xxxiii.; New Jersey Steam Navigation Company *v.* Merchants Bank, Appx. p. liv.; Riley *v.* Horne, 5 Bing. R. 218; Wyld *v.* Pickford, 8 M. & Welsb. R. 461; Hinton *v.* Dibdin, 2 Adol. & Ell. New R. 646; Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. (N. Y. R. 611; Swindler *v.* Hilliard, Rich. (S. C.) R. 286; Boyle *v.* M'Laughlin, 4 H. & Johns. (Md.) R. 291; Bean *v.* Greene, 3 Fairf. (Me.) R. 422. Notice, clearly, would not screen the defendants from loss occasioned by their negligence or want of ordinary care. Per Hubbard, J., in Thomas *v.* Boston Railroad Corp. 10 Met. (Mass.) R. 480.

[2] See *ante*, § 22, 23, *et seq.*

[3] Wyld *v.* Pickford, 8 M. & Welsb. R. 461.

notices, the carrier is liable for losses and injuries occasioned not only by gross negligence, but by ordinary negligence,[1] Therefore, as there has been occasion before to observe, in cases and by means of notices, common carriers descend only to the situation of private carriers for hire.[2] There has also been occasion before to show, that in most cases the question of ordinary negligence is more a question of fact to be determined by a jury, than of law.[3] It may be repeated, that, if the want of fair dealing, by an improper concealment of the nature and value of the goods, has been the cause of negligence in the carrier, of which he would otherwise have not been guilty, the person sending the goods cannot complain of the consequences of his own act.[4]

§ 269. The carrier will also be liable, although protected by a notice, if the loss has happened in consequence of his *misfeasance*, the difference between which and *negligence* has already been adverted to; and it appeared, that the first is in direct contravention of the carrier's contract, by which its performance is prevented, and that the latter takes place in the course of performing the contract.[5] If the carrier takes the goods beyond the place of destination, and they are lost, he is responsible, although otherwise his notice would protect him; because in so doing he has committed a misfeasance.[6] Of this description of misfeasance, is the

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[1] Story on Bailm. § 571. See also the opinion of Lord Denman, in Hinton *v.* Dibdin, 2 Adol & Ell. New R. 646.

[2] *Ante*, § 54, *et seq.*; and see the subject of *ordinary negligence* treated at large, *ante*, Chap. III. As to what was sufficient negligence to render the owners of the steamboat Lexington liable, under a special contract, see New Jersey Steam Navigation Company *v.* Merchants Bank, Appx. p. liv.

[3] *Ante*, § 51, and the authorities cited in that, and in sections following.

[4] *Ante*, § 258, *et seq.*

[5] *Ante*, § 12.

[6] Story on Bailm. § 561.

case of Ellis *v.* Turner :[1] A vessel belonging to the defendant, and plying from Hull to Gainsborough, took on board some goods of the plaintiff to be delivered at Stockwith. It went safe as far as Stockwith, and there delivered a part of the cargo, but not the goods in question ; and, in proceeding on her voyage, sunk, before she arrived at Gainsborough. The defendants had published a notice, protecting themselves from the want of care in the master or crew ; but they were, notwithstanding, made accountable for this misfeasance of their servant, the master of the vessel, in not delivering the goods at Stockwith in safety, when he might have done so.

§ 270. In like manner it will be a misfeasance to deliver the goods to the wrong person, as well as it is at the wrong time and place.[2] If the delivery be by the carrier to the wrong person, although it may have been innocently made by mistake, or by his being imposed upon, he will be liable to the owner of the goods for the full value of them, which are thus lost. Such a wrongful delivery is a misfeasance, and indeed a conversion of the property.[3]

§ 271. In like manner, also, if the goods are sent by a different conveyance from that implied in the undertaking or in a different manner, and they are lost, the carrier will be liable for the misfeasance, although otherwise he would be exonerated from the loss by the terms of a notice. In Garnett *v.* Willan,[4] such an act of misfeasance annulled the notice. The defendants, Jones & Willan, had accepted a

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[1] Ellis *v.* Turner, 8 T. R. 531.

[2] Story on Bailm. § 545 *b*.

[3] Stephenson *v.* Hart, 4 Bing. R. 470 ; Duff *v.* Budd, 3 Br. & Bing. R. 177 ; Youle *v.* Harbottle, Peake, R. 68 ; Devereux *v.* Barclay, 2 B. & Ald. R. 702 ; Stephens *v.* Elwell, 4 M. & Sel. R. 259 ; Powell *v.* Myers, 26 Wend. (N. Y.) R. 591.

[4] Garnett *v.* Willan, 5 B. & Ald. R. 53.

parcel, booked to be sent by their coach from London to Worcester; it was carried, conformably to their contract, a part of the way, and then forwarded on by another coach, in which Jones had no interest, and was ultimately lost. It was held, that the plaintiffs having contracted for the care and attention of both Willan and Jones, had had the care and attention of one only; so that they had not obtained that for which they contracted, by the wrongful acts of the defendants; and this being in direct contravention of their contract, they were made responsible for the whole loss, notwithstanding the notice. Another decision upon this point is that in Sleat *v.* Fagg.[1] The defendants, in this case, having published the usual notice, received a parcel of considerable value, and contracted to send it by the mail; no insurance was made thereon, or intimation given of its value; it was sent by another coach and lost. The Court held, that if the defendant had forwarded the parcel by the mail, in pursuance of his contract, he would not have been liable for the loss; but as he had acted in direct contravention of it, it was a misfeasance, and against that the notice was no protection.

§ 272. The above case of Sleat *v.* Fagg, is so similar in its facts to Batson *v.* Donovan,[2] and yet so opposite in its decision, that it is proper to compare the two determinations. In each of them the bailment was precisely the same; in each there was proof of the publication of the notices, of the value of the goods, of the concealment of that value, and of their loss. In the last case, the defendant was protected by his notice; in the first named case, he was held responsible for the goods. In the former case, the loss proceeded from the *negligence* of the defendant; in the latter, from his *misfeasance;* and, as the concealment of the value, which was the plaintiff's fault, had caused the negligent

[1] Sleat *v.* Fagg, 5 B. & Ald. R. 342.

[2] Batson *v.* Donovan, 4 B. & Ald. R. 21.

performance of the contract, he was barred from complaining of that which was the consequenee of his own act; but such a concealment could never cause a *misfeasance*, that is, a non-performance of the contract, and, therefore, in that case, he is entitled to maintain his action. The principle on which the decisions in these cases proceeded is perfectly intelligible, so long as *misfeasance* and *negligence* are not confounded with each other.[1]

§ 273. The carrier commits an act of misfeasance if he disregards public regulations established by law for the navigation of a canal; and consequently damage sustained by bilging in a lock which was entered by him in contravention of those regulations, must be compensated by him. The damage done by bilging would have been avoided, had the carrier's canal boat been where it ought, by the law of the canal, to have been.[2]

§ 274. In like manner, and on the same principle, a common carrier, undertaking to transport by water, is not protected by his notice, if he does not employ a vessel reasonably stout, strong, and well equipped for the voyage; for the existence of the common notice will not, in any respect, change this implied duty.[3] Neither will it change the implied duty of a common carrier to guard against a defect in the vehicle or machinery, used for the transportation; for there is a breach of the implied warranty, in such cases, that the vehicle and machinery shall be in good order and condition, and suited to the nature of the business and employment. Indeed, if they are not in such condition, and the carrier might, by exercising proper diligence, have ascer-

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[1] See Jones on Carr. 29.

[2] Atwood *v.* Reliance Trans. Co. 9 Watts, (Penn.) R. 87.

[3] See as to seaworthiness, *ante*, § 173; Story on Bailm. § 562; Lyon *v.* Mells, 5 East, R. 428; Clark *v.* Richards, 1 Conn. R. 54.

tained it, it will amount to *negligence*.[1] Still farther, it has been held, that if the defect in the vehicle or machinery, is unknown to the carrier, and is not discoverable on inspection, and the loss happens without any culpable negligence on the part of the carrier, or his agents, and there is a notice, that "all baggage is at the risk of the owner," the carrier will, notwithstanding, be liable for any loss occasioned to the baggage by the defect of the vehicle or machinery.[2] But still, it seems by an old case, that those means would be deemed sufficient, which, without any extraordinary accident, will probably perform the voyage or the journey.[3] It is the duty of common carriers on Lake Champlain, to provide boats which shall be safe and seaworthy for the season of the year at which goods are shipped.[4]

§ 275. The utmost effect, then, that can be given to a general notice, or special contract, both in England and in this country, although as broad and absolute in its terms as it can be, will not discharge a common carrier from liability for negligence, misfeasance, or want of ordinary care, either in the seaworthiness of the vessel, or her proper equipments and furniture; nor is it allowed to exempt the carrier from accountability for losses occasioned by a defect in the vehicle, or mode of conveyance used in the transportation.[5]

§ 276. It has been shown, that the *burden of proof* is on

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[1] Story on Bailm. § 571 *a*, (edit. 1846.) Carriers by land must have good vehicles, and well broke horses. M'Kinney *v.* Niel, 1 M'Lean, (Cir. Co.) R. 540.

[2] Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. (N. Y.) R. 611; Story on Bailm. § 571 *a*; and see the case of the unknown and undiscoverable defect in a *rudder*, *ante*, § 171.

[3] Amies *v.* Stevens, 1 Stra. R. 128.

[4] Day *v.* Ridley, 16 Verm. R. 48.

[5] See the opinion of Nelson, J., in New Jersey Steam Navigation Company *v.* Merchants Bank, Dec. Term Sup. Co. U. States, 1847, Appx. p. liv.

the carrier to show a knowledge of his notice in the person sending the goods ; [1] but when that is made fully to appear, the burden of proof is then on the person sending the goods to show negligence, &c. in the carrier ; which is contrary to the general rule in cases of common carriers, where there is no notice ; [2] for, *prima facie*, the burden of proof is on a common carrier to exempt himself from liability.[3]

§ 277. The question was presented, by the pleadings, for decision in Hinton *v.* Dibdin,[4] whether since the passing of the act of 11 Geo. 4, and 1 Wm. 4,[5] a carrier is liable for the loss of goods therein specified, by reason of gross negligence ; and the decision of the Court in Queen's Bench was, that, under the act, if a parcel containing any of the valuable goods enumerated in sect. 1, be sent to a carrier for conveyance without a declaration of the nature and value of such goods, and without paying, or engaging to pay, an increased charge, according to sect. 2, the carrier is not liable for their loss, though it happens by the gross negligence of his servants. Lord Chief Justice Denman, who delivered the judgment of the Court, said : " By sect. 8, it is enacted, that nothing in this act shall be deemed to protect such carrier from the felonious acts of any servant in his employ, nor to protect such servant from liability for any loss or injury by his own personal neglect or misconduct. The former branch of the clause is, to say no more, at least consistent with the supposition, that for conduct

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[1] *Ante*, § 247.

[2] *Ante*, § 282 ; Story on Bailm. § 573 ; and see *ante*, Chap. III. § 61.

[3] See Story on Bailm. § 529.

[4] Hinton *v.* Dibdin, 2 Adol. & Ell. (N. S.) R. 646. By the Common Law the servants of the carrier are not liable in any way *ex contractu* to the owner of the goods for loss or damage arising from his own personal negligence. Cavenagh *v.* Such, 1 Price, R. 328 ; Williams *v.* Cranston, 2 Stark. 82 ; Hyde *v.* Trent and Mersey Navigation Company, 5 T. R. 397.

[5] *Ante*, § 256.

short of felony the carrier is no longer liable; whereas it is obvious that, before the passing of the act, the carrier would have been liable for acts of the servant not amounting or approaching to felony — *negligence.* The latter branch seems to have been introduced *ex abundanti cautelâ*, merely, seeing that there is nothing in any part of the act to vary the liability of the servant to the master for any misconduct of the former." [1]

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[1] See the Report of Officers of Railway Department of Board of Trade in England, (1842, p. xix.) which contains the following remarks:

"The carriers' act distinctly provides, that no general notice shall limit the liability of common carriers with regard to objects other than those enumerated in the act, and the proper rule appears to be, that although railway companies may refuse to take charge of passengers' luggage, unless such reasonable regulations as they find necessary are complied with, yet, that if they do take charge of such luggage, they incur the ordinary common law liability of carriers, subject only to the limitation of the carriers' act.

"The same principles apply to regulations limiting the company's liability as regards carriages and horses. This is sometimes done by refusing to carry horses or carriages unless the owner will sign a special agreement exempting the company from all liability. This is clearly illegal as regards the general liability, railway companies being bound, like other carriers, by the Common Law, to undertake the carriage of all articles offered to them, unless there is some reasonable ground for refusal, and it is only allowable to the extent of guarding against any extraordinary risk arising from the nature or value of the object, unless a proper insurance is paid. In the case of carriages it is generally admitted that there is no ground for charging any insurance; but in the case of horses, it appears fair that the company should not be responsible for accidents arising from the viciousness or restiveness of the animal, and that they should not be responsible for more than a fair average value, unless the horse has been entered as of extraordinary value, and a reasonable insurance paid."

That a company would not be liable for accidents to horses, arising from the animals own *viciousness*, &c., see *ante*, § 214 *a*.

The report goes on to remark in a subsequent part, p. xx, that "in two instances representations had been made to the department of the Board of Trade, to the effect that railway companies were in the habit of enforcing an illegal regulation, requiring parties who sent carriages or horses by the railway, to sign a special agreement exempting the company from all liability for loss, however occasioned. Letters were written to companies,

§ 278. There may be a *waiver* of notice.[1] Bayley, J., in Helsby *v.* Mears,[2] entertained no doubt, that a common carrier, notwithstanding he has limited his responsibility by a notice, that he will not be answerable for goods of more than a certain value, may be bound by a special contract made with any individual, which is contrary to the terms of the notice; and, in this opinion, both Holroyd, J., and Littledale, J., concurred. And, it was held in this case, that an

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pointing out the illegality of such a course, excepting so far as might be necessary to protect themselves against extraordinary risk, arising from the nature or value of the object, and the result was, that the regulation as regarded carriages was entirely withdrawn, and as regarded horses, modified in conformity with principles above stated."

In the case of the York *v.* North Midland Railway Co. (Queen's Bench, 1849; Law Rep. Boston, for May, 1850,) the declaration in case stated that defendants were proprietors of the Y. and N. M. Railway, and of certain carriages for the conveyance of passengers, cattle, and goods and chattels upon the said railway for hire; that they received nine horses of the plaintiff, to be safely and securely carried in the carriages of the defendants by the railway for hire; and that, therefore, it was the duty of the defendants safely and securely to carry, and convey, and deliver the horses of the plaintiff; and then averred the loss of one by reason of the insufficiency of one of the carriages. It appeared, that, when the horses were received, a ticket was given to the plaintiff, stating the amount paid by the plaintiff for the carriage of the horses, and the journey they were to go, and having at the bottom the following memorandum: — "N B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages while travelling, or in loading or unloading." It was held that the terms contained in the ticket formed a part of the contract for the carriage of the horses; and that the alleged duty of the defendants safely and securely to carry and convey the horses, did not arise upon that contract. But Lord C. J. Denman in giving judgment, said: — "It may be, that, notwithstanding the terms of the contract, the plaintiff might have alleged, that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared, but has alleged a duty which does not arise upon the contract, as it appeared in evidence." See *post*, § 436 – 451.

[1] Jeremy on Carr. 48; Story on Bailm. § 572.

[2] Helsby *v.* Mears, 5 B. & Cress. R. 504

express agreement to carry a package of extraordinary value for the common hire, will be a waiver of the notice, even if made by one partner only, if it be within the scope of his authority.[1] So also if made by the agent or servant of the carrier. If, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk transacting the business there, a certain sum per cent., and, on the faith of this, he sends the goods, the carrier cannot charge more, although it be proved, that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates in which a greater sum is set down for goods of the sort in question.[2] Again, in the case of the Grand Junction Railway Company,[3] which has been before referred to,[4] who published a printed notice, which was affixed over the door of their station, to the effect that all goods received after four o'clock, P. M., would not be forwarded until the next working day; notwithstanding this notice, inasmuch as the company was in the habit of forwarding goods for the plaintiff delivered at the station after four o'clock, and the company's weigher, on a particular evening, told a servant of the plaintiff who brought goods to the station after the hour limited by the notice, that there was then "plenty of time," and the goods were left upon the faith of this assurance; it was held, that there was evidence to go to a jury of a special contract on the part of the railway company, to forward the goods (which were perishable) the same evening.

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1 See *ante*, § 59. If the carrier is told what is the value of the goods, and he is directed to charge what he pleases, and he chooses to charge only the ordinary hire, it is a waiver of the notice as to the goods. Evans *v.* Soule, 2 M. & Sel. R. 1; Wilson *v.* Freeman, 3 Campb. R. 527.

2 Winkfield *v.* Packington, 2 C. & Pa. R. 599.

3 Palmer *v.* Grand Junction Railway Co. 12 M. & Welsb. R. 766.

4 *Ante*, § 136.

§ 279. It appears, at one period, to have been thought, that the mere receipt of goods whose value was manifestly beyond the sum in the notice, without any extra payment therefor, was a waiver of the notice.[1] But the later doctrine seems to exclude any presumption founded merely upon the knowledge of the fact above stated, and requires some auxiliary circumstance to support it.[2]

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[1] Beck *v.* Evans, 16 East, R. 244; S. C. 3 Campb. R. 267.

[2] Story Bailm. § 572, citing Marsh *v.* Horne, 5 B. & Cress. R. 322.

CHAPTER VIII.

OF THE TERMINATION OF THE CARRIER'S RESPONSIBILITY, BY DELIVERY, AND WHAT EXCUSES A NON-DELIVERY.

§ 280. HAVING considered the duty of a common carrier to receive goods for conveyance, and having endeavored to show when, in the sense of the law, they are delivered *to* him, and that, with the delivery to him, his extraordinary responsibility commences; and having also endeavored to show the extent of that responsibility, as imposed by the Common Law, and as it may be limited, modified, or varied by special agreement and by general notices, the subject which next claims attention, is that of the delivery of goods *by* the carrier, by which his duties and responsibilities are terminated. It is therefore proposed now to consider, 1st, the obligation properly to deliver; and 2dly, what will excuse a non-delivery.

§ 281. FIRST. It has been shown to be an implied engagement on the part of every undertaker of the work of carrying, as a common carrier, to proceed without deviation from the usual and ordinary course, to the place of delivery,[1] or the port of destination;[2] and also to be the duty of the carrier, if the goods he receives for conveyance are directed to a place beyond the place to which he ordinarily professes to carry, to see that they are delivered at the place to which they are directed.[3] It has been shown likewise, that if, by the terms of the bill of lading, the carrier has the privilege of re-shipping the goods in the course of transportation, he

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[1] *Ante*, § 164. [2] *Ante*, § 175, *et seq.* [3] *Ante*, § 95, *et seq.*

is bound for their safe delivery at the place of their ultimate destination.[1] But if a carrier is instructed by his employer, to deliver goods on board of another vessel for a continuance of the transportation, and the goods are lost on board such other vessel, he is not responsible if he has safely placed them on board such other vessel, as, by so doing, his character, as common carrier, has ceased.[2] Thus, common carriers, who received goods to transport from New York to Troy, and, at the latter place, transferred them *pursuant to instructions from the bailor*, on board a canal boat bound for the north, and the goods were lost, by the upsetting of the boat, it was held, that their character, as common carriers, ceased at Troy; and that having taken proper care that the goods were safely put on board the canal boat, they were not responsible for the loss.[3]

§ 282. The undertaking of a common carrier to transport the goods to a particular destination, necessarily includes the duty of delivering them in safety; and his obligation is to deliver safely at all events, excepting the goods be lost by the act of God, or the public enemy. It is not enough, that the goods be *carried* in safety to the place of delivery, but the carrier must, and without any demand upon him, *deliver;* and he is not entitled to freight until the contract for a complete delivery is performed.[4] Hence, it has been held, that

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[1] *Ante*, § 227.

[2] Abbott on Shipp. 465, (5th Am. edit.); Strong *v.* Natally, 4 Bos. & Pull. R. 16.

[3] Ackley *v.* Kellogg, 8 Cow. (N. Y.) R. 223. Where the master of a vessel is directed to transship or deliver on board another vessel, a delivery on board such other vessel, is the termination of the duty of a common carrier. The master, at the end of the transit, is only a *forwarder*. Van Stantwood *v.* St. John, 6 Hill, (N. Y.) R. 158, reversing the decision of the Supreme Court of New York, in 25 Wend. R. 661, and *ante*, § 95. As to forwarding merchants, see *ante*, § 75.

[4] Forward *v.* Pittard, 1 T. R. 27; Garside *v.* Trent Navigation Co. 4 Ib. 581; Hyde *v.* Trent and Mersey Navigation Co. 5 Ib. 389; Harris

if a common carrier on a canal, uses the tackel or machinery of a third person in hoisting the goods from his boat, and the machinery breaks, and the goods are thereby injured, he is responsible for the damage; for, although the machinery does not belong to him, it is his *pro hac vice*, and so as to render him answerable for its sufficiency.[1] But if the warehouseman has fairly taken the goods into his own custody, the moment he applies his tackle to them, from that moment the carrier's liability is determined.[2] It appears, therefore,

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v. Rand, 4 N. Hamp. R. 555; S. C. Ib. 259. When the responsibility has begun, it continues, until there has been a due delivery by the carrier, or he has discharged himself of the custody of the goods in his character of common carrier. 2 Kent, Comm. 604, (6th edit.); Eagle *v.* White, 6 Whart. (Penn.) R. 505; Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305; Ludwig *v.* Meyre, 5 Watts & S. (Penn.) R. 435; Erskine *v.* Thames, 6 Mississip. R. 371; Carter *v.* Flagg, 13 Shep. (Me.) R. 181. It is no excuse for non-delivery for the owners of a steamboat who are common carriers, for the loss of a shipment on board of her by means of collision with another vessel, and without any fault imputable to either; there being no express stipulation of any kind, between the owner of the goods and the owners of the boat, that they should be exempted from the "perils of the sea." Plaisted *v.* Steam Navigation Co. 14 Shep. (Me.) R. 132. And see Graff *v.* Bloomer, 9 Barr. (Penn.) R. 114. In Harrell *v.* Owens, in North Carolina, 1 Dev. & Bat. R. 273, it was held, that where the master of a vessel undertakes to deliver articles on board of his vessel, on freight, at a certain place, he cannot allege ignorance, or any excuse arising from human fault or human weakness, as a defence for violating his engagement; that the true question is not one of *actual blame*, but of legal obligation. Nothing short of the act of God or of the public enemy will excuse, in a common carrier, a neglect to deliver. See also Griffith *v.* Ingledew, 6 S. & Rawle, (Penn.) R. 429.

[1] De Mott *v.* Laraway, 14 Wend. (N. Y.) R. 225.

[2] Thomas *v.* Day, 4 Esp. R. 462. Where a carrier (a master of a vessel, for example) has once fairly delivered goods to the consignee, his duty is fulfilled, and his responsibility ceases; and this ought to apprise the consignee, that every instant of the time he allows to elapse after such delivery, without objection or complaint, carries a presumption with it in favor of the master, that the goods were safely delivered, or that no blame is to be imputed to him; for it is inconsistent with his duties and obligations, and would be injurious to commerce, that his responsibility should

to be of importance to consider what is requisite to constitute a competent delivery, or such a delivery as will determine the transit and dissolve the carrier's liability. This in a great measure, is left to the jury to determine. In a trial of an action to recover damages for an injury to the plaintiff's gondola, occasioned by the negligence of the defendant, to whom it was bailed, in suffering it to be frozen in the ice, where the defence was that it had been delivered up to the plaintiff before any injury to it had taken place; it was held proper to instruct the jury, that the testimony of certain witnesses, if believed, would prove that the gondola had been so delivered up to the plaintiff.[1]

§ 283. The carrier is bound in all cases to make a proper delivery with *reasonable expedition*, if no particular time be fixed upon; for the duty to deliver within a reasonable time, is a term ingrafted, by legal implication, upon a promise or duty to carry generally.[2] A receipt given for merchandise

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be continued for months and years after such delivery. Therefore, where several packages of goods were shipped at London to a merchant in Quebec, where, upon the arrival of the vessel, and after delivery of the packages, some of the goods were missing from one of the packages; it was held, that no notice having been given until several months afterwards, the master was not responsible for the deficiency. The Court said, that although no decision of the English Courts had been adduced upon this question, yet as the general principles of law in all commercial countries, in relation to the duties of masters of trading vessels, are drawn from the same source as the French law which they quoted, have the same objects in view, and are founded in reason and justice, they must consider them as applying strongly to the present case. Stuart, (Low. Canada) R. 575; and see Pardessus, No. 730; 2 Boulay Paty, p. 325.

[1] Alley *v.* Blen, 15 Shep. (Me.) R. 308.

[2] Story on Bailm. § 545 *a*, (4th edit.); Boyle *v.* M'Laughlin, 4 H. & Johns. (Md.) R. 291; Hand *v.* Baynes, 4 Whart. (Penn.) R. 204, and cited *ante*, Chap. VI. § 177; Parsons *v.* Hardy, 14 Wend. (N. Y.) R. 215; Eagle *v.* White, 6 Whart. (Penn.) R. 505; Hill *v.* Humphreys, 5 Watts & S. (Penn.) R. 123; Wooley *v.* Riddlelien, 6 Scott, New R. 206; Wallace *v.* Vigus, 4 Blackf. (Ind.) R. 261; Ludwig *v.* Meyre, 5 Watts & S. (Penn.) R. 435; Erskine *v.* Thames, 6 Mississip. R. 371.

at Baltimore, with a promise to deliver the same to a person in Philadelphia, and to be carried by the Chesapeake and Delaware canal, it was held, in Hand *v.* Baynes,[1] was an engagement to deliver in a reasonable time; and what would be a reasonable time, the Court also held, must be determined under all the circumstances, with a view to the condition of the canal, the season of the year, the state of the weather, and such other matters as might enter into the question.

§ 284. A declaration in case, alleged, that the defendants were common carriers, and that the plaintiff delivered to them certain goods to be carried for him from London to Birmingham, and there to be delivered to the plaintiff, for reasonable hire or reward; and then averred, that it was the duty of the defendants safely and securely to carry and to *deliver* the said goods; but although that a *reasonable time* for carrying and delivering the goods, had long since elapsed, yet the defendants neglecting their duty in that behalf, did not deliver the goods to the plaintiff, but that the goods, by the negligence of the defendants, were wholly lost to the plaintiff. At the trial, it appeared that the parcel in question had been delivered to the defendants in London, on the 8th of August, addressed to the plaintiff at Birmingham, where it ought to have arrived on the 10th, but did not arrive until the 3d or 4th of September. It was held, upon this evidence, that the plaintiff was entitled to recover.[2] Again, the plaintiff sent certain goods by the defendants (carriers) to be delivered in Bedford on a certain day, in order to be ready for the market on Saturday, but did not give notice that they were left for that purpose. On that day the plaintiff's clerk proceeded there, and owing to the non-delivery till the Monday following, he removed them to another place for sale. The carrier was held liable for the

[1] Hand *v.* Haynes, 4 Whart. (Penn.) R. 204.
[2] Raphael *v.* Pickford, 6 Scott, New R. 478.

non-delivery of the goods within a reasonable time; and the expenses so incurred, it was also held, might be given by the jury as damages.[1]

§ 285. Where an action was brought in which it was alleged, that the defendant undertook, for compensation, to convey an account delivered to him, from W. to H., and to be safely delivered to one A. R.; and that the defendant, having so long delayed to deliver the same, the debt was barred by the statute of limitations, and thus wholly lost; it was held, that the plaintiff was entitled to recover.[2]

§ 286. It is no excuse for an omission to deliver money delivered to a common carrier to be by him delivered to a bank, that he went to the bank and found it shut. Thus, in an action of assumpsit against the defendant as a common carrier, for a breach of his undertaking, in that capacity, to convey a package of money belonging to the plaintiff in Connecticut, to Poughkeepsie in the State of New York, and there to deliver it to a bank in that village; and it appeared, that when the defendant arrived at Poughkeepsie, the bank was shut; that he went twice to the house of the cashier, and not finding him at home, brought back the money, and offered it to the plaintiff, who declined to accept it; and that the defendant then refused to be further responsible for any loss or accident; it was held, that in the absence of any special contract, (none was proved in the case) these facts did not constitute a legal excuse to the defendant for the non-performance of his undertaking. That the bank was shut when the carrier went there, could amount to nothing, unless it further appeared, that he went there at a proper time, during the ordinary business hours; and even then, the Court could not say, as a matter of law, that this would be a legal excuse. That there may be circumstances which

[1] Black *v.* Baxendale, 1 Exch. R. 410; 17 Law Journ. 50.
[2] Favor *v.* Philbrick, 5 N. Hamp. R. 357.

would excuse a carrier from the delivery of a package of money to a bank to which he has undertaken to convey and deliver it, is doubtless true; it would depend upon the degree of diligence which the carrier used, to let the officers of the bank know that he had a package to deliver there.[1] The proper time for a carrrier of *specie* to deliver it to a bank to which it is consigned, is not limited to *banking hours* — unless such is the special contract or the implied usage of the place; and an offer to deliver it at any time during the usual hours of business — reasonable regard being had to its safety, and the convenience of the consignee — is as good as one made in banking hours.[2]

§ 287. If in the opinion of the jury, it is proved, that goods are tendered by the carrier to the consignee late in the day, after the termination of the hours of business, and when the consignee has dismissed his hands, and is thus incapable of receiving and putting away the goods, the tender of delivery is then unreasonable as to time, and the consignee is guilty of no fault or laches in declining to receive them. Therefore, the duty of the carrier, under such circumstances, is to keep the goods still in custody, and he continues to hold them under all his responsibilities as carrier.[3]

§ 288. In Eagle *v.* White, in Pennsylvania,[4] the defendants, who were common carriers on a railroad from Philadelphia to Columbia, undertook to carry certain boxes of goods belonging to the plaintiff from Philadelphia to Columbia. The cars arrived at the latter place about sundown on a Saturday evening, and by direction of the plaintiff, were placed on a sideling, that is, a side track. The

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1 Merwin *v.* Butler, 17 Conn. R. 138.
2 Young *v.* Smith, 3 Dana, (Ken.) R. 92.
3 Hill *v.* Humphreys, 5 Watts & S. (Penn.) R. 123.
4 Eagle *v.* White, 6 Whart. (Penn.) R. 505.

plaintiff declined receiving the goods that evening, on the ground that it was too late; whereupon, the agent of the defendants left the cars on the sideling, taking with him the keys of the padlocks with which the cars were fastened, and promised to return on Monday morning. The cars remained in this situation until Monday morning, when they were opened by the plaintiff by means of a key which fitted the lock; and, on examination, it was discovered, that one of the boxes had been opened, and the contents carried away. It was held, that the defendants were liable to the plaintiff for the value of the goods lost. Rogers, J., who gave the opinion of the Court, was of opinion, that if the tender was wanting, in any one of the essential requisites of a proper time, a proper manner, and a proper place, the responsibility *as carrier* still continues. Although his strict accountability of carrier may cease, said the learned Judge, he becomes a bailee, and as such, must take ordinary care of the goods. But, in this case, said he, neither party supposed the goods were delivered, or that the responsibility had ceased. But from this opinion, Huston, J. dissented.

§ 289. But if, by any accident or misfortune, not amounting to the act of God or the act of the public enemy, the transportation of the goods is obstructed and delayed, the carrier will not be answerable for the delay so occasioned, if he has used a reasonable degree of exertion and diligence in the transportation. A temporary unavoidable obstruction only suspends, and does not avoid, the contract.[1]

[1] Hadley *v.* Clarke, 8 T. R. 259. In respect to the time of the delivery of goods, a common carrier is responsible only for the exertion of due diligence, and he may excuse delay in delivery by accident or misfortune, although not inevitable. It is enough, that he uses proper endeavors to prevent delay. In other words, the principle upon which the extraordinary responsibility of common carriers is founded, does not require that that responsibility should be extended to the time occupied in the transportation; the danger of robbery, or collusion and fraud, has no application in such case. Parsons *v.* Hardy, 14 Wend. (N. Y.) R. 215.

A common carrier on a canal may be prevented by reason of ice from accomplishing, without serious detention, the whole voyage; and in such event, he is only bound to deliver at the place to which he undertook to transport the goods, on the canal again becoming navigable.[1] The freezing of the canal may indeed, as has already, appeared,[2] be deemed the act of God; but suppose the canal boat has been retarded or obstructed in its voyage by reason of any accident or misfortune not amounting to an act of God, as by the disordered condition of some lock, in such case, the carrier will not be liable for any damage occasioned to the shipper thereby, if the goods finally arrive in safety, unless he has been guilty of negligence.[3]

§ 290. The keeper or owner of a public ferry is bound to transport goods across the stream after night, and a failure to do so, will, in Alabama, subject him to an action, under the statute, without suit upon the bond; but yet, in such actions, the defendant may show the prevalence of high winds rendering it dangerous; or, that the application was after the usual bed time, and that the residence was at some distance from the ferry.[4]

§ 291. So the carrier will be excused for his delay in delivery, if the consignee is dead or absent, or has refused to receive the goods, though, in those cases, he is not justified in abandoning the goods, as by leaving them unprotected on a wharf; his duty, on the contrary, being to secure them for the owner.[5] Although in Fisk *v.* Newton,[6] the general

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1 Parsons *v.* Hardy, *ub. sup.*

2 *Ante*, § 160.

3 Story on Bailm. § 545 *a*, (4th edit.); and see Evans *v.* Hutton, 5 Scott, New R. 670.

4 Pate *v.* Henry, 5 St. & P. (Ala.) R. 101.

5 Ostrander *v.* Brown, 15 Johns. (N. Y.) R. 39.

6 Fisk *v.* Newton, 1 Denio, (N. Y.) R. 45.

rule is recognized, that a common carrier is bound seasonably to deliver the goods intrusted to him to carry, personally to the consignee, at the place of delivery, yet it was held, that where goods are safely conveyed to their place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and *cannot after reasonable efforts be found*, the carrier may discharge himself from further liability, by placing the goods in store with some responsible third person in that business, at that place, for and on account of the owner; the storehouse-keeper, in such event, becoming the bailee of the owner of the property. In this case, the consignee of butter, sent from Albany to New York by a freight barge, was a clerk having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and, after reasonable inquiries by the carrier's agent, could not be found; and it was held, that the carrier discharged himself from further liability, by depositing the property with a storehouse-keeper then in good credit, for the owner, and taking his receipt for the same, according to the usual course of business in that trade; though the butter was subsequently sold by the storehouse-keeper, and the proceeds lost to the owner by his failure.

§ 292. When a ship-owner or master of a ship cannot without delay, deliver the goods, from their being unlawfully detained by revenue officers, his liability nevertheless continues, inasmuch as he has a remedy over against the officers for the illegal detention.[1]

§ 293. If a due delivery of goods is interrupted by persons invested with legal authority to prohibit the landing and delivery at the place at which they are destined, such legal authority must be fully disclosed in the defendants'

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[1] Gosling *v.* Higgins, 1 Campb. R. 451.

pleading. Thus, to a declaration upon a contract to carry goods from Liverpool to Canton, and there to deliver them, (all and every dangers and accidents of the seas and navigation, of whatever nature or kind soever, excepted,) to the plaintiff's agents; the defendants pleaded, that they caused the ship to sail to Canton, and that she with her goods on board arrived near to the port of Canton; that then and there certain persons, authorized officers of the British government, and then and there exercising the power of her Majesty's government, to wit, one C. Elliott, then being the chief superintendent of the trade of her Majesty's subjects to and from the dominions of the emperor of China, according to the form of the statute in that case made and provided, and one Smith, then being captain of her said Majesty's ship the Volage, then being the commanding officer of her said Majesty's naval forces there, did, for divers good and sufficient and lawful causes and reasons, them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behavior of the defendants, their master or mariners, done or committed, forcibly interrupt the said ship, being a British ship, from further proceeding on its said voyage to Canton aforesaid; and did, by virtue of the powers and authorities to them in that behalf committed, and by means of her said Majesty's naval forces then and there being under their command, and by the force and duress thereof, forcibly constrain and compel the said ship, and continually had constrained and compelled the same not to proceed to Canton aforesaid, and thereby prevented, and thenceforth always hitherto had prevented, and still did prevent, the defendants from delivering the goods at Canton. On special demurrer to this plea, it was held bad for not sufficiently disclosing, that Elliot and Smith, as chief superintendent and commander of the naval forces in the Chinese seas respectively, had legal authority, by statute or otherwise, to act in the manner alleged.[1] But this case has been refer-

[1] Evans *v.* Hutton, 5 Scott, New R. 670.

red to in support of the position, that if an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance is rendered unlawful by the government of the country, the agreement is absolutely dissolved.[1]

§ 294. But the principles of law in respect to the obligation of a carrier to deliver goods in a *reasonable* time, depending upon circumstances, though they apply, as in the foregoing cases, to *implied* contracts, will not apply to an *express* contract to deliver in a *prescribed* time. In the latter case no temporary obstruction, or even the absolute impossibility of complying with the engagement, will be a defence to an action for failure in performing the contract.[2] There is a distinction founded in reason and authority, which is, that when the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, then the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay, by inevitable necessity, because he might have provided against it by his contract.[3]

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[1] Abbott on Shipp. 704, (5th Am. edit.)

[2] *Ante*, § 37, 59.

[3] Per Rogers, J., in delivering the opinion of the Court in Hand *v.* Baynes, 4 Whart. (Penn.) R. 214; Aleyn, R. 27; Brecknock and Abergavenny Canal Navigation *v.* Pritchard, 8 T. R. 750; Hadley *v.* Clarke, 8 T. R. 259. There are also authorities on the subject as between insurers and insured. In Shubrick *v.* Salmon, 3 Burr. R. 1637, Lord Mansfield takes the distinction between implied covenants, by operation of law, and express covenants, that is, that express covenants are treated strictly. See also De Hahn *v.* Hartley, 1 T. R. 343. It has also been ruled, that if a ship warranted to sail on or before a certain day, be prevented from sailing on that day, by an embargo, the warranty is not complied with. Horne *v.* Whitmore, 2 Cowp. R. 784; Paxson *v.* Watson, 2 Cowp. R. 785. Notwithstanding any custom to the contrary, if the carrier specially undertakes to deliver, he is chargeable. Wardell *v.* Mourillyan, 2 Esp. R. 693.

§ 295. When the carriage is by land, and in the absence of any established usage, or any special contract to the contrary, the goods must be carried to the *residence* of the consignee;[1] so that coach proprietors, for example, are not released from responsibility by having the goods left at the coach-office, or at an inn, at which the coach usually stops.[2] If the carrier tenders the goods at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid, he is not bound to part with the possession of the goods; but he is authorized to take them back to his warehouse, or place of business, and he holds them thenceforward not as a common carrier,[3] but as a private bailee for hire;[4] or, (if he is not to charge warehouse rent,) as a gratuitous bailee.[5]

§ 296. In Hyde *v.* Trent and Mersey Navigation Company,[6] the subject was considerably discussed, whether the carrier was bound to deliver to the individual at his house, or whether he discharged himself from liability by delivery to *a porter*, at the inn in the place of destination. The opinion of Lord Kenyon was, that the carrier was thus discharged, but the three other Judges, Buller, Ashhurst, and Grose, were of opinion, that the risk of the carrier continued until a personal delivery at the house or place of deposit of the consignee. It was said by Buller, J.: "According to the argument, from the inconvenience, that carriers are not

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1 See 2 Kent, Comm. 604.

2 Add. on Contr. 810. Leaving at the stage-office can only be authorized, in the absence of express permission, by long established and a generally well known usage. Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305.

3 Storrs *v.* Crowley, 1 M'Clel. & You. R. 136; 2 Kent, Comm. 604.

4 As to private bailees for hire, see *ante*, Chap. III.

5 As to gratuitous bailees, see *ante*, Chap. II., and Young *v.* Smith, 3 Dana, (Ken.) R. 91.

6 Hyde *v.* Trent and Mersey Navigation Company, 5 T. R. 389.

bound to deliver goods, I think the same argument tends to establish a much greater inconvenience, the necessity of three contracts, in all cases where the goods are sent by a coach or wagon; one with the carrier, another with the innkeeper, and a third with the porter. But, in fact, there is but one contract: there is nothing like any contract, or even communication, between any other person than the owner of the goods and the carrier: the carrier is bound to deliver the goods, and the person who actually delivers them acts as the servant of the carrier. If the innkeeper has some interest in the concern, then he is liable as a carrier. It has been said too, that the place of a porter is valuable, and the subject of a purchase; but who sells it? Not the person to whom the goods are sent, but the carrier, or the innkeeper, whom I consider as the same person. If the innkeeper has no share in the profits, then he is the servant of the carrier, as well as the porter. Therefore, whether there be the innkeeper and the porter, or the porter only, the carrier is liable in all cases where the goods are lost, after they get into the hands of the innkeeper or porter, because they are delivered to those persons with the consent, and as the *servants*, of the carrier. The different proprietors may divide the profits among themselves, in any way they choose: but they cannot, by their own agreement with each other, exonerate themselves from their liability to the owner of the goods. They may fill the two different characters of warehousemen and carriers, at *different* times, but I deny that they can be both warehousemen and carriers at the same instant. *If the undertaking was to carry and deliver, then the goods remain in their custody, as carriers, the whole time.*" [1]

§ 297. On more recent occasions, in England, the opinions of other distinguished Judges have settled down in favor of the doctrine as above land down by Mr. J. Buller, and con-

[1] And see Golden *v.* Manning, 3 Wils. R. 429, in which a delivery to a porter was held to be no delivery to the consignee.

curred in by Ashhurst and Grose, Js.;[1] and an actual delivery to the proper person is now generally conceded to be the duty of the carrier.[2] Cowen, J., in delivering the opinion of the Court in Gibson *v.* Culver,[3] considers it well settled, that *primâ facie* the carrier is under obligation to deliver the goods to the consignee personally." In Eagle *v.* White, in Pennsylvania,[4] the general rule, unless modified by usage or special contract, on the subject of delivery of goods by a carrier, is considered to be, that in the contract for carriage, the common carrier engages to deliver the goods intrusted to him into the actual custody of the person for whom they are intended, at his residence or place of business; and that, in no other way can he discharge himself of his responsibility, as a common carrier, except by proving, that he has performed such engagement, or has been excused from the performance of it, or has been released from it by the act of God, &c.[5] And indeed, it has been considered to have been repeatedly ruled, that delivery at a point or place in close proximity with the place stipulated, will not relieve the carrier from his responsibility as such; and that mere propinquity of delivery is no delivery.[6]

§ 298. It is important for the master of a vessel to recollect that his engagement is to deliver the goods to the persons

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[1] Storrs *v.* Crowley, *ub. sup.*; Stephenson *v.* Hart, 4 Bing. R. 476; Garnett *v.* Willan, 5 B. & Ald. R. 356; Bodenham *v.* Bennett, 4 Price, R. 34; Duff *v.* Budd, 3 Brod. & Bing. R. 177; Birkett *v.* Willan, 2 B. & Ald. R. 356.

[2] 2 Kent, Comm. 604; Story on Bailm. § 543.

[3] Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305.

[4] Eagle *v.* White, 6 Whart. (Penn.) R. 505.

[5] See also Moore *v.* Sheredine, 2 H. & M'Hen. (Md.) R. 453; Chickering *v.* Fowler, 4 Pick. (Mass.) R. 453; Young *v.* Smith, 3 Dana, (Ken.) R. 92.

[6] Graff *v.* Bloomer, 9 Barr. (Penn.) R. 114. And see De Mott *v.* Laraway, 14 Wend. (N. Y.) R. 226, and *ante*, § 282.

mentioned in the bill of lading or their assigns.[1] Where the owner of a canal boat gave a receipt for a quantity of nails, which he agreed to deliver to W. L. No. 17 Walnut Street, Philadelphia, and on arrival of the boat in Philadelphia, the captain delivered the nails at the wharf of the defendants, who were forwarding and commission merchants, with instructions not to deliver them until the freight was paid; the Court considered, that the delivery on the wharf was no delivery to the owner or the consignee.[2]

§ 299. To cases where the engagement is to deliver to the persons mentioned in the bill of lading, the before mentioned case of Hyde *v.* Trent and Mersey Navigation Company is applicable. To the declaration on a contract by the master of a steam-vessel to convey goods from Dublin to London, and to deliver the same at the port of London to the plaintiff or his assigns, a plea, that, after the arrival of the vessel at London, the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff or his assigns, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes; and that before a reasonable time for delivery had elapsed, they were destroyed by a fire, which broke out by accident, was held ill. The reason stated by Tindal, C. J. was, that it left the matter in uncertainty. At what interval, after the arrival of the vessel, the defendants caused the goods to be landed, did not appear; and whether a reasonable time was allowed to elapse after the vessel's arrival in the port of London, in order to give time to the plaintiff to claim and receive his goods from alongside the vessel, the plea was altogether silent. It was quite consistent, said the learned Judge, with the allegations in the plea, that the plaintiff demanded the delivery of his

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[1] Abbott on Shipp. 463, (5th Am. edit.)

[2] Humphreys *v.* Reed, 6 Whart. (Penn.) R. 435.

goods before they were landed, and that the defendants refused or neglected to permit him to receive them. It left, said he, the matter in uncertainty, whether the plaintiff was not compelled against his will to receive his goods from a wharf where there is no allegation that such is the *usual practice* in the port of delivery; and he thought the principle laid down in the case of Hyde *v.* Trent Navigation Company, had a close bearing upon and governed the decision of the case before the Court.[1] The judgment in this case was affirmed in the Exchequer Chamber,[2] in which Patteson, J. said, that the defendants were calling upon the Court to hold, that a delivery of the goods in question at a strange wharf, is a delivery according to the contract. And Lord Denman, C. J., said: "The delivery at Fenning's wharf was certainly not a delivery under the bill of lading, unless the usage and practice of the port of London made it so." The judgment in the Exchequer Chamber was also affirmed in the House of Lords, excepting in so far as it related to a question of costs.[3]

§ 300. The doctrine appears to be established in this country, that, in the absence of a special contract or of established and well known usage, the mere landing of goods from a vessel on a wharf, is not such a delivery to the consignee as will discharge the carrier. Where goods were put on board the defendant's sloop to be carried from New York to Albany, and on their arrival at Albany, were, by the direction of the defendant, put on a wharf there, it was held not to be a delivery to the consignee, even though the goods were taken by a cartman who had often carted for the consignee.[4] The responsibility of a common carrier on the Ohio River, does not cease, it has been held, by the delivery of goods on the

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[1] Gatliff *v.* Bourne, 4 Bing. New R. 314.

[2] 1 Scott, New R. 1.

[3] 8 Scott, New R. 604.

[4] Ostrander *v.* Brown, 15 Johns. (N. Y.) R. 39.

wharf, and notice given to the consignee; but the duty of the carrier is to attend to the actual delivery.[1] Landing cotton on a wharf in Charleston (S. C.) was held not a delivery, it not being made so by usage.[2] In the absence of usage to the contrary, it has been held in Vermont, that a delivery of the goods on the wharf is not necessarily a delivery to the wharfinger.[3] If a consignee goes on board a vessel and sees a list of the goods, which are then in the hold of the vessel, that is not evidence of a delivery; nor is it, if the master soon afterwards puts them on the dock, but not in the presence, nor with the knowledge of the consignee.[4]

§ 301. But the *primâ facie* obligation of the carrier to make an actual delivery to the consignee personally, may be affected by a well established and generally well known custom and usage.[5] The doctrine in respect to all commercial usage is, that to have it take the place of general law, it must be so uniformly acquiesced in by length of time, that the jury will feel themselves constrained to say, that it entered into the minds of the parties, and made a part of the contract.[6] It was agreed in Hyde *v.* Trent and Mersey Navigation Company, that the obligation of a carrier to deliver might be affected by the customs of the trade, though *primâ facie* the carrier is bound to a personal delivery.[7] In Garside

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[1] Hemphill *v.* Chenie, 6 Watts & S. (Penn.) R. 62.

[2] Galloway *v.* Hughes, 1 Bail. (S. C.) R. 553.

[3] Blin *v.* Mayo, 10 Vt. R. 56. That a delivery to a wharfinger is not in general a delivery according to the direction, see Wardell *v.* Mourillyan, 2 Esp. R. 693.

[4] Ostrander *v.* Brown, *ub. sup.*

[5] Story on Bailm. § 543; 2 Kent, Comm. 604.

[6] By Lord Ellenborough, C. J. and Grose, J., in Rushforth *v.* Hadfield, 7 East, R. 224, and the doctrine recognized in Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305. And see *ante*, § 229, 230.

[7] Hyde *v.* Trent and Mersey Navigation Company, 5 T. R. 389. So also in Ostrander *v.* Brown, 15 Johns. (N. Y.) R. 39; Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305; Blin *v.* Mayo, 10 Vt. R. 56; Galloway *v.*

v. the same Company, usage and course of business were received to determine whether the defendants, at the time when the goods were burned, held them as common carriers, or mere warehousemen for the plaintiff; the proof was confined to the course of business in the particular line of stages, and the cause was determined in favor of the defendants.[1] Lord Tenterden, in treating of the duties of carriers by water, says: — "The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places, and the usage of particular trades." [2]

§ 302. If a common carrier from A. to B. receives goods to be carried from A. to B., and by the known usage and course of business, the goods are to be deposited in the carrier's warehouse at B., the responsibility, as common carriers, is limited to the arrival of the goods at B., when he holds them, not as common carrier, but as a mere warehouseman.[3] The keeping of the goods in the warehouse, in such cases, is, as was observed by Buller, J., "not for the convenience of the carrier, but of the owner of the goods; for when the voyage is performed, it is for the interest of the carrier to get rid of them directly." [4]

§ 303. In the case of Thomas *v.* Boston and Providence Railroad Corporation,[5] whose terminus was at Boston, the

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Hughes, 1 Bail. (S. C.) R. 553; Hemphill *v.* Chenie, 6 Watts & S. (Penn.) R. 62; Chickering *v.* Fowler, 4 Pick. (Mass.) R. 371; Van Stantwood *v.* St. John, 6 Hill, (N. Y.) R. 158; Cope *v.* Cordova, 1 Rawle, (Penn.) R. 203.

[1] Garside *v.* Trent and Mersey Navigation Company, 4 T. R. 581.

[2] Abbott on Shipp. 463, (5th Am. edit.)

[3] Rowe *v.* Pickford, 8 Taunt. R. 83; In re *v.* Webb, 8 Taunt. R. 443, and see *ante*, § 75, 131 – 135.

[4] Garside *v.* Trent and Mersey Navigation Company, *ub. sup.*

[5] Thomas *v.* Boston and Providence Railroad Corp. 10 Metc. (Mass.) R. 472.

plaintiff, who lived in a town in the neighborhood of the defendants' warehouse in Boston, was not ready to receive all his goods, and agreeably to usage, they were left for his convenience in the warehouse, and not for any benefit to the defendants; but the defendants were charged, as common carriers, with the loss of a roll of leather from the warehouse. At the trial, in the Court of Common Pleas, before Wells, C. J., it was proved or admitted, that four rolls of leather, the property of the plaintiff, were delivered to the defendants at Providence, to be transported to Boston; that they were so transported, and were deposited at the defendants' depot at Boston; that a teamster, employed by the plaintiff, shortly after called at the depot, with a bill of the freight receipted by the defendants, and inquired for the leather; that it was pointed out to him by the defendants' agent, who had charge of the depot; that the teamster then took away two of the rolls, and soon after called again and inquired for the other two; that he was directed to look for them; and that he found only one. The defendants, to show that they were not liable for any loss occurring while the goods were deposited at their depot, offered to prove that they had, prior to this time, posted up notices containing this expression: "merchandise, while in the company's storehouses, is at the risk of the owners thereof;" and that these notices had been so long posted up, and so extensively circulated, that the plaintiff must be presumed to have known their contents; and that the plaintiff, prior to the time of the loss, had frequently employed the defendants to transport goods for him. The Judge ruled that the evidence was inadmissible. The jury were instructed "to ascertain from all the evidence, what was the contract between the parties, and if they were satisfied that it was the usage and practice of the defendants, not only to transport goods over the road, but also to deposit them in their warehouses, without charge, until the owner should have a reasonable time to remove them, and that they did provide warehouses or depots for the purpose of so storing the goods, this usage and conduct

would be sufficient evidence for the jury to find that it was a part of the contract, that the defendants should so store and keep the goods delivered to them for transportation; and that, if such was the contract, then their liability as common carriers would continue while the goods were stored in the depot; but that in the present case, if the goods, after having been so stored, were actually delivered to the plaintiff or his agent, or if an arrangement was entered into between the parties, by themselves or their agents, by which the defendants agreed to part with the custody and control over the property, and the plaintiff agreed to assume the custody and control over it, although there was no actual delivery, or if the plaintiff or his agent so improperly conducted himself, either by language or acts, as to lead the defendants or their agents to believe (they acting with proper care and discretion) that the plaintiff had undertaken to assume the control of the property, and had discharged the defendants from any further responsibility, and the defendants, in consequence, ceased to take any further charge or oversight of the property, the responsibility of the defendants would be thereby terminated; that the burden of proving these facts was upon the defendants." A verdict was returned for the plaintiff, and the defendants alleged exceptions to the instructions given to the jury. Hubbard, J., by whom the opinion of the Supreme Court was delivered, after stating the question to be, whether the defendants were liable as common carriers, after the goods were safely stored in their warehouse depot, proceeded to say: — "The transportation of goods and the storage of goods are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one depot or place of deposit, and delivering it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise

at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do. To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unladed and put into a place of safety. After such delivery at a depot, the carriage is completed. But, owing to the great amount of goods transported and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unladed and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods, which are not called for on their arrival at the places of destination, are unladed and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment, terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them, and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common carriers being ended, the proprietors, are, by force of law, depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care. In the case at bar, the goods were transported over the defendants' road, and were safety deposited in their merchandise depot, ready for delivery to the plaintiff, of which he had notice, and were in fact in part taken away by him; the residue, a portion of which was afterwards lost, being left there for his convenience. No agreement was made for the storage of the goods, and no further

compensation paid therefor; the sum paid being the freight for carriage, which was payable if the goods had been delivered to the plaintiff immediately on the arrival of the cars, without any storage. Upon these facts, we are of opinion, for the reasons before stated, that the duty of the defendants, as common carriers, had ceased on their safe deposit of the plaintiff's goods in the merchandise depot; and that they were then responsible only as depositaries without further charge, and consequently, unless guilty of negligence in the want of ordinary care in the custody of the goods, they are not liable to the plaintiff for the alleged loss of a part of the goods." With regard to the *notices* posted up, and which were relied on by the defendants, that merchandise in their warehouse was at the risk of the owners, the learned Judge said: — "In the course of the trial, the defendants offered to prove that, prior to the transportation of the plaintiff's leather, they had posted up notices containing this provision, viz. 'merchandise, while in the company's storehouses, is at the risk of the owners thereof;' and that from the length of time they had been posted, and the prior dealings of the plaintiff with them, he must be presumed to have had knowledge of the fact; but the evidence was not admitted. We are not called upon, in this case, to decide as to the legal character of such notices; a subject which has been fully considered in this country, as well as in England. See Hollister *v.* Nowlen, 19 Wend. 234, and Cole *v.* Goodwin, 19 Wend. 251, and the long list of English authorities there cited, on page 269. In the view of the law bearing upon this case, viz. that the defendants are not liable as common carriers, the notice, we think, becomes unimportant, as it clearly would not screen the defendants from loss occasioned by their negligence or want of ordinary care; and beyond that they are not chargeable. Other questions which arose upon the trial it is not necessary to notice. For the reasons stated, we think the learned Judge erred in his instructions to the jury, that the liability of common carriers continued to attach to the defendants while the goods were stored in

their depot. The verdict must therefore be set aside. Upon the evidence as reported, there appears little ground to charge the defendants with want of ordinary care in the custody of these goods; but that is a question to be settled on the further trial of the case."

§ 304. Therefore, when a common carrier pursues the business both of transportation and warehouse-keeping, the nature and extent of his liability will depend upon the character in which he is accustomed to hold the goods at the time of the loss.[1] If they are received into the warehouse of such carrier to await the future orders of the owner or consignor as to their destination, the carrier is clothed only with the ordinary duties and responsibilities of a warehouseman; his responsibility, as common carrier, having ceased.[2] If a common carrier between A. and B. receives goods to be carried from A. to B., and thence to be forwarded by a distinct conveyance to C.; as soon as he arrives with the goods at B., and deposits them in his warehouse there, his responsibility as carrier ceases; for that is the termination of his duty as such.[3] A common carrier, it has been shown, is liable for losses by fire not occasioned by inevitable necessity, as by lightning; whereas a warehouseman is not liable for any losses by fire, unless it be in consequence of ordinary negligence.[4] But if the destination is marked out, and the carrier has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible, as common carrier, for any loss or damage that may happen to the goods in the warehouse, as they are then in *transitu*, in contemplation of law.[5] If the consignee, having no warehouse

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[1] Ante, § 75, 131 – 135; Story on Bailm. § 446.
[2] Garside *v.* Trent and Mersey Navigation Company, 4 T. R. 581.
[3] Ante, § 75, 131 – 135.
[4] Ante, Chap. III.
[5] Forward *v.* Pittard, 1 T. R. 27.

of his own, asks the carrier to keep the goods until he can conveniently send for them, the carrier's liability, as common carrier, is at an end, and he thenceforth holds them only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for care and custody of them.[1] A common carrier, therefore, when his responsibility, as such, is thus changed to that of a warehouseman, is in the same situation as if he had offered to deliver the goods at the residence of the consignee; that is, he has fulfilled his contract as a carrier; and if the hire is not paid, he is not bound to part with the possession of the goods; but he may lawfully take them back to his warehouse, or place of business, and he holds them thenceforward not as a common carrier, but as a bailee for hire; or if by agreement, he is not to charge warehouse rent, as a gratuitous bailee.[2] In all cases of this description, the material consideration is, whether the carrier retains the possession of the goods, or is to perform any further duty, either by *custom* or *contract*, as carrier.[3]

§ 305. It has been stated and shown to be the duty of the master of a vessel, under his engagement to deliver goods to the persons mentioned in the bill of lading or their assigns, to make an actual delivery to the proper person;[4] that is, in the absence of any special contract or well known usage to the contrary.[5] The defendant, in Ostrander *v.* Brown,[6] offered to prove, that it was customary in the city of Albany for the captains of vessels freighted with goods for merchants in that place, to deliver them by putting them upon the dock, and giving notice to the consignees, who usually

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1 See Ante, § 295; Webb *in re*, 8 Taunt. R. 449.

2 Storr *v.* Crowley, 1 M'Clel. & You. R. 136; Young *v.* Smith, 3 Dana, (Ken.) R. 91.

3 See Ante, § 301; Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305.

4 *Ante*, § 298, *et seq.*

5 *Ante*, § 301, *et seq.*

6 Ostrander *v.* Brown, 15 Johns. (N. Y.) R. 39.

had cartmen to carry them to their stores, and that such delivery, with notice, was, by custom, considered a good delivery. Platt, J., who delivered the opinion of the Court, said: "In a case where the *precise place of delivery* is material, it may be proper to allow evidence of *local usage.* For instance, says he, the usage at Havana is often proved to show that some species of cargoes, such as slaves, are to be delivered at the Moro Castle, and that other articles are delivered only on the wharves in the inner harbor."

§ 306. In Chickering *v.* Fowler,[1] the action was an action of assumpsit upon the following contract, dated Newburyport: — "Received on board brig Fanny 93 barrels of onions, which I promise to deliver to Thomas Haven, of Portsmouth, he paying freight for the same five cents per barrel." Trial was had on the general issue. The brig, of which the defendant was master, it appeared, was going from Newburyport to Portsmouth, for freight to some southern port, and she had only these onions on board as freight from Newburyport to Portsmouth. The defendant went with the brig to the Pier wharf in Portsmouth, where vessels frequently go to deliver goods which they have on freight for persons in Portsmouth, and gave notice to Haven, that the onions were there for him. Haven told the defendant, that he must deliver them at his (Haven's) wharf, or he would not receive them. The defendant, the master, refused to do this, and a day or two after put the onions on the wharf, where they remained two nights, and were frozen and injured. The plaintiff contended that the defendant, both by the custom of Portsmouth, and by the general rules of law, was bound to deliver the onions at the wharf of the consignee, and that he was liable for his gross negligence in not taking reasonable and ordinary care of them. It appeared, that the goods were shipped by the plaintiff by the

[1] Chickering *v.* Fowler, 4 Pick. (Mass.) R. 371; S. P. in House *v.* Schooner Lexington, (N. Y. Distr. Co.) 2 N. Y. Legal Observer, 4.

order of Haven. The Court held, that a promise by a master of a vessel to deliver goods to a consignee does not require that he should deliver them to the consignee personally, or at a particular wharf, it being sufficient if he leaves them at some usual place of unlading, giving notice to the consignee that they are so left; and if after such notice the consignee refuses to receive the goods, it is the duty of the master to take care of them for the owner; unless the consignee is under an obligation to receive them, when they will be at his risk; and such facts are for the jury.

§ 307. In case for not delivering, *according to the plaintiff's direction*, an anchor sent by defendant's hoy, but by him left with the wharfinger, (at the quay where the hoy usually discharged her cargo,) who had paid the defendant the freight, and gave him a receipt for the goods delivered; although it was proved, that by the custom the hoymen never troubled themselves about the goods after their delivery at the wharf, (except in cases of flour); it was held, "that such custom did not discharge the hoyman from his implied undertaking to deliver the goods according to the direction; and the delivery to the wharfinger was not a delivery according to the direction." [1]

§ 308. If the goods, after their arrival, are put on board of a lighter in the customary way, and the owner then takes exclusive custody of them before they are landed, the carrier is discharged from any subsequent loss.[2] In the river Thames, in England, the liability of the master by custom continues whilst the goods are delivering into a lighter, sent by the consignee to receive them, until the loading is completed.[3] In an action of assumpsit against the master of a ship, for not safely conveying and delivering a quantity of

[1] Wardell *v.* Mourillyan, 2 Esp. R. 693. See Jeremy on Carr. 19, 65; Add. on Contr. 798, 810.

[2] Strong *v.* Natally, 4 Bos. & Pull. R. 16.

[3] Jeremy on Carr. 66.

tallow to the plaintiffs in London, who were the consignees, the plaintiff had sent a lighter to fetch the tallow from the ship, which had arrived in the Thames. Whilst the lighter was left lashed to the ship, with part of the tallow on board, it was cut from the ship, and part of the tallow stolen thereout; and although the defendant had told the lighterman, that he had not hands enough to guard the lighter, (to which no answer was returned,) it was said by Lord Kenyon: "The custom of the river must undoubtedly govern the parties. There might have been a special contract, limiting the defendant's duty, but he could not do that by any act of his own, without the consent of the other party."[1] But it has been much contested, says Lord Tenterden, whether the master is by usage bound to take care of the lighter, after it is fully laden, until the time when it can be properly removed from the ship to the wharf;[2] and at a trial, he says, on this question, it was held, that the master was not obliged to do this.[3]

§ 309. In England, when goods are brought by ships from *foreign countries*, the bill of lading is merely a special undertaking to carry *from port to port;* and in such case, it has been considered that, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the ship-owner.[4] Buller, J., in Hyde *v.* Trent and Mersey Navigation Company,[5] says: "When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from

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[1] Catley *v.* Wintringham, Peake, N. P. Cases, 140.

[2] Abbott on Shipp. 465, (5th Am. edit.)

[3] Robinson *v.* Turpin, cited in Abbott, *sup.*, as decided Guildhall Sit. after Trin. Term, 1805, Lord Ellenborough, C. J. This was an action by the owner of the goods against a lighterman, and the plaintiff obtained a verdict. At a former trial before Sir James Mansfield, C. J., the plaintiff had been nonsuited. But see Strong *v.* Natally, *ub. sup.*

[4] Abbott on Shipp. 463, (5th Am. edit.)

[5] Hyde *v.* Trent and Mersey Navigation Company, 5 T. R. 389.

port to port." Ashurst, J., in the same case, says: "The case of *foreign goods* brought to this country depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant; by the general custom, the liability of ship-carriers is at an end when the goods are landed at the usual wharf." But this difference in the ingredients necessary to constitute a sufficient delivery by the inland and foreign ship-carrier, seems not to be incidental to their respective characters, but to arise from the nature of their respective contracts; the latter undertaking, by the bill of lading, to convey from port to port, is discharged by a delivery pursuant to the undertaking; the former contracting to deliver to the consignee is bound to the performance of an actual delivery in accordance with his contract; though if he had only engaged to convey generally from one place to another, a delivery at the latter place might discharge him, as that at the port does the ship-carrier; in the case, for instance, where the land carrier's warehouse is the place of delivery.[1]

§ 310. In this country, the rule adopted in regard to foreign voyages, seems to be that, in such cases, the carrier is not bound to make a personal delivery of the goods to the consignee; but it will be sufficient that he lands them at the usual wharf or proper place of landing, and gives due and reasonable notice thereof to the consignee.[2]

§ 311. In Cope *v.* Cordova, in the Supreme Court of Pennsylvania,[3] it was held, that the master of a vessel arriving at the port of Philadelphia, from a foreign port, is not bound by the bill of lading, to deliver the goods personally to the consignee; and that the liability of the ship-owner ceases when the goods are landed on the usual wharf. Rogers, J., who

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1 See *ante*, § 302, 303, 304.

2 Story on Bailm. § 545; 2 Kent, Comm. 604.

3 Cope *v.* Cordova, 1 Rawle, (Penn.) R. 203.

gave the opinion of the Court, said: "In unloading a vessel at the port of Philadelphia, it is usual, as soon as articles of bulk, such as crates, are brought upon deck, to pass them over the side of the ship, and land them on the wharf. The owners station a clerk on the wharf, who takes a memorandum of the goods, and the day they are taken away, and this for the information of his employers. A manifest or report of the cargo is made by the master, and deposited at the custom-house, and the collector, on the arrival of the vessel within his district, puts and keeps on board one or more inspectors, whose duty it is to examine the contents of the cargo and superintend its delivery. And no goods from a foreign port can be unladen or delivered from the ship in the United States, but in open day, between the rising and setting of the sun, except by special license; nor at any time without a permit from the collector, which is granted to the consignee upon payment of duties or securing them to be paid. The holders of a bill of lading are presumed to be well informed of the probable period of the vessel's arrival, and at any rate such arrival is matter of notoriety in all maritime places. The consignee is previously informed of the shipment, as it is usual for one of the bills of lading to be kept by the merchant, a second is transmitted to the consignee by the post or packet, while the third is sent by the master of the ship together with the goods. With the benefit of all these safeguards, if the consignee uses ordinary diligence, there is as little danger in this country as in England and France, of inconvenience or loss; whereas the risk would be greatly increased if it should be the duty of the ship-owner to see to the actual receipt of the goods, and particularly in the case of a general ship with numerous consignments on board, manned altogether by foreigners unacquainted with the language at the port of delivery. I have taken some pains to ascertain the opinion and practice of merchants of the city on this question, which is one of general concern. My inquiries have resulted in this, that the goods, when landed, have heretofore been considered at the risk of the consignee,

and that the general understanding has been, that the liability of the ship-owner ceases upon the landing of the goods at the usual wharf. I see no reason to depart from a rule which has received such repeated sanctions, from which no inconvenience has heretofore resulted, and which it is believed in practice has conduced to the general welfare. If the special verdict had found a uniform usage in the one way or the other, we should have held ourselves bound by the custom; for I fully accede to the principle, that the mode of delivery is regulated by the practice of the place. The contract is supposed to be made in reference to the usage at the port of delivery. But if no usage had been found, we hold it to be equally clear, that we should be governed by the general custom. The case finds that the consignee obtained a permit for the landing of the goods, that they were landed on the wharf, that he was aware the master was employed in discharging his cargo, and that the consignee sent his own porter to receive and take them away; that he inquired for them, but did not receive them. If, under such circumstances, the goods were lost, it was in consequence of his own negligence or his servant's. It was the duty of the porter, instead of merely inquiring, to stay till he had actually received the goods. It is beside the question to say, that perishable articles may be landed, at improper times, to the great damage of the consignee. When such special cases arise, they will be decided on their own circumstances. This goes on the ground that the master has acted with good faith, and in the usual manner, and in such case it is the opinion of the Court that the ship-owners are discharged." The learned Judge concluded by saying, that the Court would wish to be understood as giving no opinion on the law which regulates the internal or coasting trade, to which he understood the case of Ostrander, in New York, to apply; and he did not consider that the opinion of the Court interfered with the principles of that case.[1]

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[1] See Ostrander *v.* Brown, *ante*, § 300. In Hemphill *v.* Chenie,

§ 312. In England, when ships arrive from Turkey, and are obliged to perform quarantine, before their entry into the port of London, it is usual for the consignee to send down persons, at his own expense, to pack and take care of the goods; and, therefore, where a consignee had omitted to do so, and goods were damaged by being sent loose to shore, it was held, that he had no right to call upon the master of the ship for compensation.[1]

§ 313. If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to receive the goods at the vessel or at the wharf, as soon as the arrival of the vessel is reported, it is of the essence of the rule, that such is a good delivery, that *due and reasonable notice* should be given to the owner or consignee, so as to afford him a fair opportunity of providing suitable means to take care of, and carry off, the goods.[2] Such notice comes in lieu of, and answers for, an actual delivery, where the goods, according to the usual course of business, are to be deposited in any particular place.[3] Carriers by ships and boats must stop at the wharf; railroad cars must remain on the track, and notice of the arrival and place of deposit, in these cases, comes in lieu of personal delivery.[4] The general rule is recognized in Fisk *v.* Newton, in New York,[5] to be, that a common carrier is bound to deliver the goods

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6 Watts & S. (Penn.) R. 62, the Court considered, that the rule, as to landing goods upon the wharf, however it might apply to maritime vessels in foreign trade, did not properly apply to transportation on our western waters, or the internal or the coasting trade.

[1] Dunnage *v.* Joliffe, before Lord Kenyon, C. J., at Guildhall Sit. Mich. Term, 1789, cited in Abbott on Shipp. 465, (5th Am. edit.)

[2] 2 Kent, Comm. 604; Cope *v.* Cordova, *ub. sup.*; Wardell *v.* Mourillyan, 2 Esp. R. 693; Quiggin *v.* Duff, 1 M. & Welsb. R. 574; Packard *v.* Getman, 6 Cow, (N. Y.) R. 757, and cited more fully, *ante*, § 145.

[3] Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305.

[4] Ibid.

[5] Fiske *v.* Newton, 1 Denio, (N. Y.) R. 45; and see Story on Bailm. § 545.

intrusted to him for conveyance, personally to the consignee at the place of delivery, with the qualification, that, in certain cases, where the transportation is by vessels and boats, notice of the arrival at the place of deposit is sufficient.

§ 314. Goods were forwarded by K., a carrier from London to Liverpool, addressed to the plaintiff (at the Isle of Man) "care of D., (the defendant,) Brunswick Street, Liverpool." The goods were landed by K. on a public wharf at Liverpool, and on the same day notice was sent to the defendant of their arrival, and he signed the carrier's book, containing an acknowledgment that the goods in question had arrived for him (the defendant.) He caused them also to be entered in the clearance and manifest of a steam-vessel about to sail for the Isle of Man. It was proved also, that on former occasions, when goods had been brought by K. for the defendant, he had desired that they might remain at the wharf till he sent for them. The defendant never sent to the wharf for the boxes until six days after their arrival, when they were not to be found. In an action on the case against the defendant for negligence in not taking proper care of the goods, it was held, that there was evidence for the jury of a delivery to, and acceptance by, him.[1]

§ 315. The carrier is of course bound to continue his care of the goods until a knowledge of the notice is brought home to the owner or consignee.[2] It has been held by the Supreme Court of Louisiana, that landing goods by the captain of a vessel on the levee at New Orleans, being the usual place of unloading, with notice in the newspapers to the consignees, is not sufficient.[3] In Vermont it has been held, that a person undertaking to carry lumber down a river to a certain cove,

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1 Quiggin *v.* Duff, 1 M. & Welsb, R. 173.

2 2 Kent, Comm. 604, 605, (6th edit.)

3 Pacard *v.* Bordier, 2 Kent, Comm. (6th Am. edit.) n. (f) to p. 605.

and being refused a place of deposit there, he left them near by in as proper a place as could be found, from which they were carried away by a flood and lost, was responsible, because he did not continue his care until he had given notice to the owner, and until the owner had a reasonable time to assume the care over them.[1]

§ 316. But the carrier may be permitted to prove, that the uniform usage and course of the business in which he is engaged is to leave the goods at his usual stopping places, in the towns to which they are directed, without notice; and if such usage has been of so long continuance as to justify a jury to find that it was known to the employer, the carrier will be discharged.[2] A transportation company on Lake Champlain were intrusted with a package of bank bills, to carry from Burlington to Plattsburgh, which was directed to the cashier of the bank at the latter town, and they delivered the same to the wharfinger at the wharf at the latter town, at which the boat touched, from whom it was stolen. In an action by the consignors against the company for the value of the package, it was held, that it was competent for the company to prove, that it was their uniform usage to deliver such packages of money, when intrusted to them, to the wharfinger having the care of the wharf where the boat landed, without giving any notice to the consignee; and that such usage was well known to the consignors.[3] In a subsequent case between the same parties, and before the same Court, the Court say: — "Whatever *heretofore* may have been the views of the Court upon this point, a majority are now of opinion that it is not necessary to prove, that the plaintiff had personal knowledge of the usage, in order to make it available to the defendants."[4]

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[1] Picket *v.* Downer, 4 Verm. R. 21.

[2] Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305.

[3] Farmers and Mechanics Bank *v.* Champain Transp. Co. 16 Verm. R. 52.

[4] 18 Vermt. R. 131.

They considered, that, upon this point, the case of Van Stantwood *v.* St. John,[1] had a direct bearing upon the case at bar; and they considered the doctrine of that case to be, that when goods are delivered to a carrier, marked for a particular place, without any directions as to their transportation and delivery, except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not.

§ 317. As to the delivery of the *baggage of passengers* from stage-coaches, steamboats, railroad cars, &c., the subject incidentally received a degree of attention in a former chapter, in treating of the different descriptions of property for the carriage of which persons become responsible, as common carriers.[2] The necessity of delivery of baggage to the passenger, at the end of his journey, by the common carrier, before his responsibility can cease, was there inculcated; but the subject here deserves more particular attention than has before been bestowed upon it.

§ 318. Stage-coach proprietors were held bound, in Cole

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[1] Van Stantwood *v.* St. John, 6 Hill, (N. Y.) R. 157. Whenever a wharf is the usual place of receiving goods by a consignee, it is a sufficient place of delivery. Sawyer *v.* Joslin, 20 Vermt. R. 172. But in Ohio it was held, that a local custom at Memphis regulating the mode of delivering the goods there, is not binding on shippers in Cincinnati, unless known to merchants and shippers there. Albatross *v.* Wayne, 16 Ohio R. 513. In Delaware, the usage or custom must have been of standing notoriety, as to warrant a jury to find, that the owner or consignee of the goods had knowledge of it; because having such knowledge, it is presumed that the usage made part of the contract, and is equivalent to a direction given by the owner or consignee to the carrier to deposit the goods at the stopping place. McHenry *v.* Railroad Co., 4 Harring. (Del.) R. 448, the Court citing as authority Gibson *v.* Culver, 17 Wend. (N. Y.) R. 305.

[2] See *ante*, § 107 117.

v. Goodwin,[1] and in Powell *v.* Myers,[2] as common carriers, to deliver to each passenger, at the end of his journey, his trunk or baggage; and in the former case it was held, that they could not exonerate themselves from this obligation by a notice that all baggage was "at the risk of the owner."[3] The defendants, in the former case, were stage-coach proprietors, on a line from Cherry-Valley in Otsego county, to Manlius in Onondaga county, and from thence west. The plaintiff took a seat in one of their coaches as a passenger from Cherry-Valley to Madison, a town in the line of the route, and paid the usual fare for himself and his baggage, consisting of a trunk containing clothing, $20 in bank-bills, and a few books. The *name of the plaintiff* and the *place of his destination* were marked on a way-bill, but no mention made of his trunk. The trunk was put *on board*, said the witness, (probably in the usual place for carrying baggage.) The distance from Cherry-Valley to Madison is forty-two miles. The coach arrived at Madison about seven o'clock in the morning, and was driven to the stage-house, the usual stopping place for breakfasting. The plaintiff left the coach and walked across the street, giving no directions as to his trunk; he returned to the stage-house and took breakfast. There was a change of horses and driver at this place, *but no change of the coach.* The coach stopped at Madison about an hour. The new driver, when about to start, asked the plaintiff, supposing him to be a passenger, if he was going on, and received an answer in the negative. The coach then drove on. About an hour afterwards, the plaintiff inquired for his trunk of the driver who drove the coach to Madison, who answered, that he did not know that he had a trunk, and asked him why he had not spoken about it. This driver testified, that when

[1] Cole *v.* Goodwin, 19 Wend. (N. Y.) R. 251.

[2] Powell *v.* Myers, 26 Wend. (N. Y.) R. 591.

[3] See on the subject of such notices, *ante*, § 238–245, and Hollister *v.* Nowlon, Appx. p. xviii., and Cole *v.* Goodwin, *ub. sup.*, and Appx. p. xxxiii.

he saw the plaintiff leave the coach and go across the street, he supposed he had left, and had no baggage. Eleven months after the loss of the trunk, it was found at Auburn and brought back to Hamilton, where it was opened, and all its contents found safe, except that only $3 in bank-bills were found in the trunk instead of $20, put in at Cherry-Valley. It was proved, that it was an invariable custom in respect to this line and stage-coaches generally carrying passengers and their baggage, not to take off any of the baggage at the stopping places *where the coaches were not changed*, unless at the request of the passengers. Proof of this custom was objected to, but received by the Judge. It was also proved, that the defendants had posted up at all the stopping places of their coaches, advertisements in respect to their line of stage-coaches, containing a notice "*all baggage at the risk of the owner;*" and that such an advertisement was posted in the stage-house at Cherry-Valley, where the plaintiff resided, and it was also proved, that the plaintiff *had knowledge of such notice.* The Judge charged the jury that the defendants were *bound to deliver the trunk to the plaintiff* on the arrival of the coach at Madison, notwithstanding the usage not to remove trunks and baggage when the coaches were not changed, unless at the request of passengers; inasmuch as there was no proof that the plaintiff had notice of such usage, or of the fact that the coaches were not changed at Madison. BRONSON, J.: — "The defendants insist that they were only carriers of the trunk to Madison, and were not bound to take it from the coach, or deliver it at that place, without a notice or request from the passenger. In the form in which the objection was taken on the trial, it seemed to be thought important that the trunk was not booked, nor entered in the way-bill; and that it was not labelled or directed to any particular person or place. These are not matters of which the defendants can complain. It was for them, and not for the plaintiff, to determine whether the trunk should be mentioned in their books, or entered on the way-bill; and whether they would

carry the trunk without a label or direction, was also a matter for their consideration when the contract was made. Having assumed the responsibility of carrying the property, it is not for them to object that they did not adopt all proper precautions to guard against accidents. If the plaintiff on request had neglected or refused to comply with any reasonable regulation of the defendants, it would have presented a different question. But nothing was required of him but the usual fare, and that was paid. In considering whether the defendants are answerable for not delivering the trunk at Madison, it is important to notice that no fraud or intentional concealment is imputed to the plaintiff. Nothing of the kind was pretended on the trial. The plaintiff was a youth, then probably leaving his parents for the first time to enter a public school. Wanting experience as a traveller, and having his thoughts engrossed with other subjects, he forgot his baggage until the coach had departed. This was the whole extent of his error. If the cause turned on the want of diligence, there would perhaps be some difficulty in saying which party ought to bear the loss; though my opinion would, in that view of the case, be against the defendants. They certainly were not without fault. They might have mentioned the trunk as well as the passenger on the way-bill, and thus have advised their coachman and agents that the plaintiff had baggage to be removed at Madison. As this precaution was omitted, it was the duty of the driver, if he did not know how the fact was, to inquire of a passenger leaving the coach, whether he had baggage to be removed. But there was a further and most culpable neglect of duty in not pursuing after the coach, when the plaintiff missed his baggage. The coach had been gone but a short time, and at the rate it was travelling might easily have been overtaken. The plaintiff was among strangers, and had no means of pursuing. He applied to Wilbur, the coachman who had driven to Madison, to go after the stage, and was answered that he had no horse. The answer was false, for the horses had been exchanged at

that place. Goodwin, the defendants' agent, was absent. The plaintiff applied to his son, but he declined doing any thing. He also applied to the keeper of the stage-house, but with no better success. The defendants select their own servants, and are answerable for their defaults. The coachman was chargeable with gross negligence for not pursuing and recovering the property. He probably thought more of the saving clause in the advertisement, 'all baggage at the risk of the owner,' than he did of the suffering traveller." COWEN, J: "If the carrier will depend on the care of the owner, (and I admit there is often a necessity for it under every responsibility,) he certainly may do so; but it is a solecism to say he is a common carrier, while we deny the very duty which is essential to that character. A mere chalk mark and the dash of a pen upon the way-bill would in most cases avoid all risk; and it would be strange, indeed, that the omission of an easy precaution should be deemed by the law equivalent to the act of God. It is really too much like gross negligence. The owner many times cannot reach the baggage room on account of the crowd; and if you demand that he should mention or call for it, you require an exertion of body or lungs, to which few would be equal under all emergencies. Beside, he may not know whom to address. Are you bound to mark the direction yourself? The carrier knows the stopping place, which is perhaps resolved on at the moment, and he holds the way-bill. If the article be not properly directed and entered, let him wait till both be done, or refuse for that reason to undertake what he cannot perform, if there be not time to affix the proper marks. He knows what marks and entries will accord with his system of business, and be intelligible to his agents on the line. All this care belongs in good reason, where the law has placed it, with the carrier himself. The question is one of simple custody, for care follows custody. This has been held of an innkeeper, whose obligation is much like that of a carrier, and stands upon the same reason. 2 Kent's Comm. 591, 3d edit. He

is liable for all the goods which his guest brings with him to the inn, even though he hold the key of his chamber where the goods are. Story on Bailm. § 479; 2 Kent, Comm. 593, 594, 3d edit. But if he take the exclusive custody of the goods, or positively interfere with them so as to put them in peril, or deliver them to a third person for custody, the innkeeper is exonerated. Story on Bailm. § 483; 2 Kent, Com. 595, 3d edit. 'It appears to me,' said Bayley, J., in Richmond *v.* Smith, 8 Barn. & Cress. 9, 'that an innkeeper's liability very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated where the guest chooses to have his goods under his own care.' The analogy was in some measure extended to the *carrier* by the case of Miles *v.* Cattle, 6 Bing. 743. The plaintiff, a passenger, had with him his own bag of clothes in the coach, into which bag he slipped a £50 bank note belonging to another, who had directed it to be booked at the carrier's office. It could not have been booked without a reward. The plaintiff thus had it in his exclusive custody, and therefore it was held that he should not recover. In another respect the case was like that before us. At York, his place of destination, he got out of the coach and walked away, and was gone two hours; yet the point was not even made, that he should for that reason fail to recover for his bag and clothes, which had been purloined with the note during his absence. And this, though the case was stronger for a point of gross neglect than the present; for he retained the actual though not the exclusive custody of his bag. In the case before us the regular fare was paid for the plaintiff and his baggage; and the trunk probably placed in the usual separate department." But NELSON, C. J., dissented from the opinion of the other two Judges, in so far as they resolved, that the proprietors of a stage-coach were responsible for the loss of a trunk, although the passenger, after his arrival at the end of the journey, permitted the coach to proceed on without an inquiry after his trunk,

and was silent on the subject for an hour after the coach left.[1]

§ 319. The obligation of the carrier safely to deliver baggage was in the above case of Cole *v.* Goodwin, sought to be qualified by *usage*, and in reference to this ground of defence, BRONSON, J., said: "The defendants set up a *usage* in managing their line of stages, to discharge themselves from liability for the loss of the trunk. The usage proved amounts to this: At Richfield and Bridgewater, where the coaches are changed, the baggage is removed as a matter of course; but at Madison, where the coaches are not changed, they only remove baggage at the request of the passenger. How is the traveller to learn this practice of the defendants, which is different at the two ends of a single stage, except by that kind of experience which the plaintiff has acquired? There is no evidence that he knew any thing about this practice. And besides, the usage only proves that the defendants have been habitually careless in managing their business. It does not go far enough. They should have established a usage to be exempt from the legal consequences of their negligence." COWEN, J. said of the obligation safely

[1] See *ante*, § 114. In Richards *v.* London and South Coast Railway Co. the declaration stated, that the defendants were common carriers for hire on a railway from W. to S.; that the plaintiff's wife was received as a passenger, with her dressing case and other luggage, to be conveyed from W. to S., and there safely delivered to the plaintiffs for reasonable reward. Breach, that the defendants did not use due care in the conveyance, but that, by their carelessness and negligence, the dressing case was lost. The evidence was, that the plaintiff's wife was received at W. as a passenger to S., and the dressing case was placed in the same carriage with herself; that, on arriving at S. she, being in a weak state of health, was carried to a hackney coach, and her luggage was removed thither by the defendants' servants, and the dressing case was never seen after leaving the railway carriage. It was held, that the evidence supported the declaration; that the duty of the defendants to deliver was charged, and they had not delivered; and it was also held, that it was not necessary to prove negligence, although it was charged. 13 Jur. 986, and Law Rep. for February, 1850, p. 531.

to deliver: "This obligation is sought to be qualified by a *usage* of the defendants' line, to which the plaintiff is a total stranger. Indeed, in the absence of knowledge of the usage, he is told that the charge of the baggage belonged to himself; and that, by silently departing from the stage at Madison, with apparent unconcern, he improperly lulled the driver into a state of carelessness. It is an answer, that all this was avoidable by a little seasonable caution; and I have yet to learn, that when a common carrier is called to account for losses, the passenger is to be answered by his own want of care. It is placing the obligation upon the wrong man. The passenger has surrendered the custody of his baggage to the coach owners, whose obligation is absolute; and the law will not endure that they should answer either by the utmost care in themselves, or the want of it in another. I speak independent of all usage; for none is brought to the knowledge of the plaintiff. The carrier must take measures at his peril to learn and abide by the place of his delivery, either as fixed by law, or at the utmost by the established and notorious usage of the line; such usage *being known* to the passenger."

§ 320. Although the arrival of the baggage at its place of destination in safety, will not discharge the carrier until its delivery to the owner, still, unless demanded *within a reasonable time*, the liability of the carrier, in his strict character of *common carrier*, will not continue. There may be cases, where, at some time after the arrival at the place of destination, the strict responsibility of the common carrier, as such, for baggage remaining in his possession undelivered, without fault or neglect of his own, should cease, and he would then continue to hold them, not as a common carrier, (that is, as insuring against all but the act of God, &c.) but as a mere bailee in deposit, gratuitously or otherwise, according to the circumstances.[1]

[1] Powell *v.* Myers, 26 Wend. (N. Y.) R. 591. As to the liability as depending on *circumstances*, see *ante*, § 304.

§ 321. Common carriers of passengers and their baggage are liable for the baggage, if delivered upon a *forged* order, and their innocence in so delivering will not discharge them. In error from the Supreme Court of New York, Myers brought an action in the Common Pleas against Powell and others as common carriers, for the loss of a trunk and its contents, taken on board a steamboat owned by the defendants, at West Point, by a son of the plaintiff, who at the time was a minor, and took passage in the boat for New York. The boat usually arrived at New York between nine and ten o'clock in the evening. Shortly before arriving at the dock, a young man named Pruyin, (who accompanied the plaintiff's son from West Point,) in his presence inquired of the master of the boat whether their baggage would be safe on board the boat during the night; who answered that it would be perfectly safe, for it was under the protection of a watch until morning. Passengers occasionally stayed on board during the night, but usually left the boat on arriving in the city. Pruyin stayed on board, but the plaintiff's son left the boat soon after its arrival, and on the next morning at about eight o'clock went to the boat for his trunk, and then learnt that it had been delivered on a *forged order*. A negro man had come on board and presented an order for the trunk. The master of the boat pointed it out to the negro. Pruyin, who was present, observed, that the trunk had been left in his charge. The master of the boat said there was an order for it, when Pruyin said, "very well," and told the negro to take it. The Judge charged the jury, that the defendants were responsible for the delivery of the baggage of travellers in their boat, unless lost by inevitable accident; that if the trunk had not been delivered to the passenger, and was not so lost, the defendants remained liable, even after the arrival of the boat at the wharf. To which charge the counsel for the defendants excepted. The jury found a verdict for the plaintiff, on which judgment was rendered; which judgment was affirmed by the Supreme Court, on the ground that this case

was not distinguishable from Cole *v.* Goodwin, and Hollister *v.* Nowlen. The defendants removed the record into the Court of Errors, by writ of error, where the judgment of the Supreme Court was affirmed.[1]

§ 322. Although it makes no difference, as to the responsibility of the carrier, that the owner of the baggage goes with it; or that it is accompanied by his servant; yet the carrier is not responsible for a safe delivery if an article of baggage which the owner has kept entirely within his own custody, as for instance, an overcoat not delivered to the carrier, and left by the passenger on a seat in the vehicle.[2]

§ 323. A delivery of the goods to a duly authorized *agent* of the owner or consignee is of course a sufficient delivery.[3] But, in an action for non-delivery, if the defence is, that a delivery was made to an agent, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. In Ostrander *v.* Brown,[4] the goods were taken away from the wharf where they were landed, without the direction of the consignee, by a cartman usually or always employed to transport his goods; yet this was held not to be evidence of a delivery, as the cartman was not to be deemed the general agent of the consignee for receiving his goods. "Because," said the Court, "a merchant usually selects a cartman, and employs him exclusively in carrying goods, according to his orders, it by no means follows, that such cartman is his general agent for receiving goods without orders."

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[1] Powell *v.* Myers, 26 Wend. (N. Y.) R. 591.

[2] *Ante*, § 113; and as to what amounts to a delivery to a carrier, see Chap. V. § 140 – 142. And see further, as to the conveyance of passengers with baggage, and the delivery of the latter, *ante*, § 107 – 117.

[3] D'Anjou *v.* Ball, 3 H. & John. (Md.) R. 206; Lewis *v.* Western Railroad Co. 11 Met. (Mass.) R. 509; and *ante*, § 146.

[4] Ostrander *v.* Brown, 15 Johns. (N. Y.) R. 39.

§ 324. The carrier is under as much obligation to deliver the goods to the *right person*, as he is to deliver them in a reasonable time and at the proper place. If the delivery be to the wrong person, although it be entirely by mistake, or by gross imposition, the carrier will be responsible for the value of the goods so lost. A wrongful delivery in respect to the person is indeed, by the Common Law, treated as a conversion of the property.[1] Therefore, as has appeared, a delivery of goods by a carrier upon a forged order will not discharge him.[2]

§ 325. When the carrier fails in the discovery of the person mentioned as consignee, his duty is to hold the goods in some way for the use of the consignor.[3] In Stephenson *v.* Hart,[4] the plaintiff having been imposed upon by a swindler, consigned a box at Birmingham by the defendants, as common carriers, to J. West, 27 Great Winchester Street, London. The defendants found that no such person resided there; but upon receiving a letter signed J. West, requesting that the box might be forwarded to a public house at St. Albans, they delivered it there to a person calling himself West, who showed that he had a knowledge of the contents of the box; that person having disappeared, and the box

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[1] Story on Bailm. § 545 *b*; The Huntress, (case of) Daveis, (Dist. Co.) R. 83. Warehousemen are not only responsible for losses which arise by their negligence, but also for losses occasioned by the innocent mistake of themselves and of their servants, in making a delivery of the goods to a person not entitled to them. For it is a part of their duty to retain the goods until they are demanded by the true owner; and if, by mistake, they deliver the goods to a wrong person, they will be responsible for the loss, as upon a wrongful conversion. Lubback *v.* Inglis, 1 Stark. R. 104. The Roman Law inculcated a like duty, says Story, Bailm. § 450, and illustrated it by the case of a garment delivered to a fuller to dress, which he exchanged by mistake, or delivered to a wrong person, and held him in such a case liable for the loss. Dig. Lib. 19, tit. 2, § 6.

[2] Powell *v.* Myers, 26 Wend. (N. Y.) R. 591; and *ante*, § 321.

[3] *Ante*, § 291, 295, 304.

[4] Stephenson *v.* Hart, 4 Bing. R. 476.

having been originally obtained from the plaintiff by fraud, it was held that the defendants were liable to him in an action of trover. The argument which had been raised for the defendants, by the assertion that the box had been delivered to the right person, was answered, said Park, J., by saying that a felon cannot be the right person; and as to the defendant's liability to an action at the suit of West, till it was ascertained that the bill he had given would not be honored, such an action, in the opinion of the learned Judge, might have been well defended by showing that the box was tendered at Great Winchester Street, and that no such person was known there. Burrough, J., was clear, that when it was discovered, that no such person as the consignee was to be found in Great Winchester Street, that contract was at an end, and the goods remaining in the hands of the carriers as the goods of the consignor, a new implied contract arose between the carriers and the consignor, to take care of the goods for the use of the consignor. The circumstance, said he, that no such person as the consignee was ever heard of at the place to which the goods were addressed, ought to have awakened the suspicions of the defendants, and they were guilty of gross negligence in parting with them without further inquiry.

§ 326. The case of Duff *v.* Budd[1] was a harder case than the preceding one of Stephenson *v.* Hart.[2] There the plaintiffs, having received an order from a stranger to furnish goods for J. Parker, of High Street, Oxford, and finding, upon inquiry, that Mr. Parker, of High Street, was a tradesman of respectability, forwarded the goods by a carrier, having directed them to J. Parker, High Street, Oxford. On the arrival of the parcel at Oxford, the carrier's porter there, who knew W. Parker, of High Street, (and who was accustomed to deliver parcels at the houses of the consignees,)

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[1] Duff *v.* Budd, 3 Bro. & Bing. R. 177.

[2] Per Park, J., in Stephenson *v.* Hart, *ub. sup.*

told him of the arrival of the parcel, no other Parker residing in that street. W. Parker said he expected no parcel. A person to whom the porter had before delivered parcels under the name of Parker, called at the defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name in Oxford. The plaintiffs, having lost their goods, desired the defendant, by letter, to apprehend the person who had taken them, if he again presented himself, and afterwards said that they could have done with the defendant, if the man who had the parcel were produced. The plaintiffs, having sued the carrier, and the Judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the general notice of the carrier limiting his responsibility to a certain amount, and a verdict having been found for the plaintiffs, the Court refused to grant a new trial, which was moved for, on the grounds that the question touching the notice ought to have been considered; that the Judge ought to have pointed the attention of the jury to the plaintiffs' letter, directing the carrier to apprehend the cheat, and the subsequent conversations thereon; and that the property of the goods had passed out of the plaintiffs. In this case, the language of Richardson, J., is important, who said, "There was clearly a property in the plaintiffs entitling them to sue, as they had been imposed upon by a gross fraud."[1]

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[1] Trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery occurred by mistake only. Devereux *v.* Barclay, 2 B. & Ald. R. 702; and the case of Youl *v.* Harbottle, Peake's Cas. 49, shows, that a carrier is liable in trover for a mis-delivery. But there is a great distinction between an omission and an act done. Ross *v.* Johnson, 5 Burr. R. 2827. A. undertook to carry flour for B. to a certain place, and through mistake, deposited by the way a part of the flour, which was taken away by C. B. refusing to receive a part only, C. took the remainder, and paid A. for the whole. This was held to amount to a conversion by A., which would support an action of trover. Bullard *v.* Young, 3 S. (Ala.) R. 46.

§ 327. Secondly. As to what will excuse or justify a non-delivery of the goods by the carrier. After what has been said in preceding chapters, it is hardly necessary here to say, that it is a sufficient excuse or justification for a common carrier to show, that the goods have been lost by the act of God or of the public enemy, and without negligence or malfeasance on his part;[1] that a carrier for hire, who is not a common carrier, will be excused for the same omission, which is in consequence of losses which are not the result of ordinary negligence;[2] and that a carrier without hire will be excused in case of loss, if it has not happened from his gross negligence.[3] In respect to common carriers it may also be said, that in cases of special limitation of responsibility, it is a sufficient excuse for non-delivery, that the loss arose by other perils than the act of God, &c., against which he did not insure, and under circumstances which do not subject him to the charge of ordinary negligence.[4]

§ 328. So a non-delivery will be excused where goods have, from actual necessity, been thrown overboard to lighten a vessel and to preserve the lives of the crew and passengers; as in the instances which have already been given;[5] and also as in the case of the steamer Missouri, a new and seaworthy boat, which encountered a severe gale on Lake Huron, and after long struggling with the tempest, the master and crew thought it necessary to lighten her, in

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[1] *Ante*, Chap. VI.

[2] *Ante*, Chap. III. The driver of a stage-coach, having received money to carry, the burden of proof is on him to excuse a non-delivery; and evidence to show that third persons have admitted that another package of money was stolen from the stage on the same day when he received the money in question, is not competent evidence to be submitted to the jury to prove a loss. Sheldon *v.* Robinson, 7 N. Hamp. R. 157.

[3] *Ante*, Chap. II.

[4] *Ante*, Chap. VII.

[5] *Ante*, § 215.

order to save her with her freight and passengers.[1] And so likewise may a carrier show, in justification of non-delivery, that the goods have perished from some inherent defect, and not by any fault of his;[2] or that the nature and value of the goods were not disclosed to the carrier, and in consequence of which he did not bestow upon them that degree of care and attention which he would have done, if not thus improperly kept in ignorance by his employer.[3]

§ 329. A carrier by water will be excused for non-delivery, if it has been occasioned by the illegal act of the shipper.[4] Goods on board a vessel may be forfeited by the illegal act of the shipper, and if so, and they are seized for the forfeiture, the carrier is discharged from his obligation to deliver. But still, a mere seizure, for a supposed forfeiture, and without justifiable cause, will not discharge him; for if he is a common carrier, he is still bound by his undertaking to carry and deliver, as an insurer against all losses but those happening from the act of God and the public enemy.[5]

§ 330. The carrier will be excused for a non-delivery of the goods at the place of their destination, by an agreement or any act of the owner or shipper which discharges the carrier from any further responsibility.[6] The goods may, with the consent of the owner or shipper, be delivered over to another carrier, or be deposited at an intermediate place to await future orders.[7] In an action to recover damages alleged to have been caused by the defendant's negligence in

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1 Rossiter *v.* Chester, 1 Doug. (Mich.) R. 154. See also Halwersen *v.* Cole, 1 Spears, (S. C.) R. 321.

2 *Ante*, § 210, 211.

3 *Ante*, § 258, *et seq.*

4 Story on Bailm. § 579.

5 Gosling *v.* Higgins, 1 Campb. R. 451; and see *ante*, § 193.

6 Story on Bailm. § 578.

7 Ibid.

the delivery of a block of marble, it was held, that if A. for whom the marble is transported by a railroad company, authorizes B. to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A., and B. instead of receiving the marble at the usual place of delivery, requests the agent of the company to permit the car, which contains the marble, to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B. in hauling the car to such depot, and B. there requests and obtains leave of that company to use its machinery to remove the goods from the car; then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the marble from the car, nor for the want of strength in the machinery used for the removal of the same, and cannot be charged with any loss that may happen in the course of such delivery to A.[1]

§ 331. Subsequent directions to the carrier, as to the place of delivery, will excuse a non-delivery at the place of their original destination. So if the original destination of goods is altered by the plaintiff or his agent, instructing the carrier to take the advice left with a certain person at the original destination, whether they were to go to L. or B., and the carrier finds no advices left for him, and then carries the goods to L., where he stores them, taking a receipt of the receiver, which the carrier duly transmits to the shipper, the carrier is not liable for non-delivery or negligence.[2]

§ 332. If the owner or shipper is induced from any cause to accept the goods short of the place to which they were at first intended to be conveyed, the carrier is not only discharged from further liability, but is entitled to a *pro rata* compensation for the transportation as far as it has been

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[1] Lewis *v.* Western Railroad Company, 11 Met. (Mass.) R. 509.
[2] Boyle *v.* M'Laughlin, 4 H. & Johns. (Md.) R. 291.

continued. In Parsons *v.* Hardy,[1] the suit was brought to recover the price of transportation of a quantity of merchandise from Albany to Ithaca. The plaintiff proceeded with his load until he arrived at the lock on the canal near Montezuma, which he was prevented from passing in consequence of ice in the canal, and winter setting in, he landed his load and put it in charge of the lock-tender, from whom the defendants received it, and transported it, at their expense, to Ithaca. It was held, that although the carrier was responsible for the final delivery of the merchandise in safety, yet the defendants, by accepting the goods at Montezuma, discharged the carrier from further responsibility, and became liable to pay him a *pro rata* compensation for the transportation to that point. So in Hunt *v.* Haskell,[2] where a common carrier by sea engaged to deliver goods at a place named for a stipulated sum as freight, and the owner received his goods before they arrived at the place appointed in the bill of lading, it was held, that the carrier was excused from delivery at the place first intended, and is entitled to a *pro rata* freight. In Lorent *v.* Steinmitz,[3] it was held, that the owner of goods on freight may authorize their delivery at an intermediate port; or if supervenient causes render the landing of the goods at such port necessary, and he accepts them there, the carrier is discharged, and is entitled to freight *pro rata*. The owner of goods was held, by the Supreme Court of Michigan, to have voluntarily accepted them at an intermediate port, when, knowing that the voyage had been abandoned, (its further prosecution having become impossible, or extremely hazardous,) he there demanded his goods from the agents of the forwarders with whom they were stored, tendering payment of their charges for storage.[4]

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[1] Parsons *v.* Hardy, 14 Wend. (N. Y.) R. 215.
[2] Hunt *v.* Haskell, 11 Shep. (Me.) R. 339.
[3] Lorent *v.* Steinmitz, 1 Nott & M'Cord, (S. C.) R. 132.
[4] Rossiter *v.* Chester, 1 Doug. (Mich.) R. 154.

§ 333. But the acceptance of the goods at a place short of the place of delivery at first intended, taken in the abstract, will not discharge the carrier. To have that effect the goods must be accepted, or, in other words, taken out of the custody of the carrier, before any cause of action has arisen, by reason of any negligence imputable to the carrier. Nothing, in fact, is better settled than that, after an injury has been committed, the cause of action cannot be discharged by any act short of a release, or acceptance of something in satisfaction.[1]

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[1] Bowman *v.* Teall, 23 Wend. (N. Y.) R. 306. This was an action on the case, brought against the defendants, as common carriers, in the transportation of one thousand bushels of salt, which they had undertaken to carry from New York to Albany. The salt was received by the defendants at New York, on board of a lake boat, which was towed by a steamboat as far as Red Hook, when she was cast off by the steamboat in consequence of the obstruction of ice in the river. The lake boat was, however, worked up as far as Catskill, and there left by the master in charge of a person employed by him. The plaintiff and one of the defendants were at Catskill on *Friday*, and saw the salt. The plaintiff on that occasion told one B., a resident of Catskill, that he and Teall were going to Hudson to sell the salt, and that if he (B.) did not hear from him before the following *Monday*, to take the salt and store it. The boat sprung a leak on *Saturday* night, when B. took out the salt and stored it. Subsequently he removed it to another place, where, during the winter, it was overflowed by a freshet, and the principal part of it melted. There was evidence tending to show *negligence* in starting the salt from New York, and afterwards in not getting the boat up from Catskill. The Judge was requested to charge, that if the jury believed the plaintiff received the salt, or exercised any dominion over it, or gave any direction at Catskill concerning it, this defeated the action; and that if they believed B. directed the salt to be stored, that would have the effect to defeat the plaintiff. Both requests were held by Cowen, J., who gave the opinion of the Court, to be founded on principles entirely false. If the Judge, said he, charged as he was desired to do, the jury might have been entirely cut off from the consideration of two important questions; one, whether the defendants had been guilty of negligence in not transporting the salt to Albany; and the other, as to negligence in their manner of causing it to be stored for the winter. The carrier, he said, was bound to exercise ordinary forecast in anticipating the obstruction; to exert the proper means for overcoming it; and to exercise due diligence in accomplishing

§ 334. If the owner of the goods merely accompanies them in their transit, it will not excuse a non-delivery, unless he has the exclusive custody of them.[1] And, although interference by the owner by giving directions, may, under circumstances, be evidence of an acceptance, it is never an acceptance of itself.[2]

§ 335. If the goods are by the real owner taken from the possession of the carrier, will it afford an excuse for non-delivery to the bailor ?[3] In general, the carrier is not permitted to dispute the title of the person who delivers the goods to him, and such is clearly the rule when an adverse claim is not asserted by the real owner, but is merely asserted by the carrier of his own mere motion.[4] It was formerly considered that if an adverse title was asserted by a superior claimant, and the carrier had due notice of it, and was forbidden to deliver to the bailor, he might protect himself from responsibility, and set up such title against the bailor. Thus it was held in Ogle *v.* Atkinson,[5] that a warehouse-man receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to re-deliver them, if they are the property of another, and the latter

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the transportation; and must not, in the mean time, be guilty of negligence in taking care of the property detained. But that none of these matters, in the form proposed, would have been admissible, even in mitigation of damages.

[1] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 419; and see *ante*, § 113, 322.

[2] Bowman *v.* Teall, *ub. sup.* The general principle was adopted in Todd *v.* Fingley, 7 Watts, (Penn.) R. 542, that if injury happen to property in the hands of a bailee, the interference of the bailor to remedy the evil, will not release the bailee from liability for the consequence of his negligence.

[3] See Shelby *v.* Scotchford, Yelv. R. 23; Wilson *v.* Anderton, 1 B. & Ad. R. 450; King *v.* Richards, 6 Whart. (Penn.) R. 418.

[4] See Story on Agency, § 217; Story on Bailm. § 582; King *v.* Richards, *ub. sup.*

[5] Ogle *v.* Atkinson, 5 Taunt. R. 759.

prohibits the re-delivery. But this doctrine seems now to be untenable,[1] and it is said that, in general, an agent has no right to set up an adverse title against that of his principal, and that the bailee is bound to deliver the goods back to the person by whom he has been intrusted with the custody of them.[2] The carrier may, therefore, be placed in a situation in which he cannot safely deliver the goods to either party. For where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title.[3] But the situation of the bailee is not one without remedy. He is not bound to ascertain who has the right, and he may file a bill of interpleader in a Court of Equity. If the bailee forbears to adopt that mode of proceeding, and makes himself a party, by retaining the goods for the bailor, he must stand or fall by his title.[4]

§ 336. An exception, however, is allowed where the principal has obtained the goods fraudulently or tortiously from a third person.[5] In Hardman *v.* Willcock,[6] the defendant was employed to sell, as an auctioneer, certain goods then in the plaintiff's possession. Before the sale a notice was given to the defendant by the assignees of an insolvent, that the goods were their property, as such assignees, and that they had been fraudulently removed by collusion between

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[1] Story on Bailm. § 450, 582.

[2] Story on Agency, § 217; Gosling *v.* Birney, 7 Bing. R. 339; Kieran *v.* Sanders, 6 Adol. & Ell. R. 516; Holl *v.* Griffin, 10 Bing. R. 246.

[3] Story on Bailm. § 450, 582; Taylor *v.* Plummer, 3 M. & Selw. R. 562; Wilson *v.* Anderton, 1 B. & Adol. R. 450; Story, Eq. Jurisp. § 814 – 816.

[4] Per Lord Tenterden, C. J., in Wilson *v.* Anderton, *ub. sup.*; Com. Dig. Chancery, 3 T.

[5] Story on Agency, § 217.

[6] Hardman *v.* Willcock, 9 Bing. R. 378, note.

the plaintiff and the insolvent. At the trial, the jury affirmed the right of the assignees, and upon the state of facts as found by the jury, they were directed by Patteson, J., to find a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for the amount of the sale, in case the Court should be of opinion, that it was not competent for the defendant, in the peculiar situation in which he stood to the plaintiff, to set up the right of the assignees. It was accordingly moved to enter a verdict for the plaintiff, on the ground, that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. It was held, that the Judge was right, and that the verdict ought to stand. There were many authorities, said Alderson, J., which were cited for the plaintiff, which, without doubt, established that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. But the Court think, said he, that all those cases were distinguishable from the present, upon the ground that the jury had found that the plaintiff's possession of the goods arose out of a fraud concerted between him and the insolvent; and on this ground the verdict might well stand consistently with those cases. "We are very glad," the learned Judge observed, "that this case can be thus decided consistently with the general rules of law, as it is obviously in conformity to the substantial justice of the particular case."

§ 337. Again, in King *v.* Richards, in Pennsylvania,[1] the question was, whether the defendants, the bailees of goods delivered to them as common carriers, ought to be permitted to show, in an action brought by the bailors or their assignees, that the bailors had no right to the goods whatever. The defendants were common carriers between New York and Philadelphia, and had signed a receipt for certain goods as received of A., which they promised to deliver to his order.

[1] King *v.* Richards, 6 Whart. (Penn.) R. 418.

In trover by the indorsees of this paper, who had made advances on the goods, it was held, that the defendants might prove that A. had no title to the goods; that they had been fraudulently obtained from the true owner; and that, upon demand, they had delivered them up to the latter. Kennedy, J., who delivered the opinion of the Court, considered that it might be correct to hold, where the real owner of the property does not appear and assert his right to it, that the carrier shall not be permitted, of his own mere motion, to set up, as a defence against his bailor, such right for him.

§ 337 *a*. There can be no doubt, that if a bailee receive goods, and the bailor has no title to them, and they are taken from the custody of the bailee *by the authority of the law*, it will be a defence of an action brought against him by the bailor for a non-delivery. And, although in general an agent cannot dispute the title of his principal, yet this doctrine will not protect goods received by a bailee from an execution against the person depositing them; and if goods are taken from a wharfinger or warehouseman by lawful process, he can protect himself in a suit brought against him by the owner.[1]

§ 338. If the carrier pays damage for the loss of goods, it is of course tantamount to a safe delivery, and he is consequently entitled to his freight.[2] But an acceptance of the goods by the owner, after they have received damage in consequence of the carrier's negligence, is no bar to an action for such damage; for, as it has been already laid down, nothing short of a release or satisfaction constitutes such a bar.[3]

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[1] Burton *v.* Wilkinson, 18 Vermt. R. 186.

[2] Hammond *v.* M'Clure, 1 Bay, (S. C.) R. 101; and see D'Anjou *v.* Ball, 3 H. & Johns. (Md.) R. 206.

[3] *Ante*, § 333, and Bowman *v.* Teall, there cited from 23 Wend. (N. Y.) R. 306; and see also Willoughby *v.* Backhouse, 2 Barn. & Cressw. R. 821; Baylis *v.* Usher, 4 M. & Payne, R. 790.

§ 339. The exercise of the right of *stoppage in transitu*, or the right of stopping the goods in the custody of the carrier during their transit, affords a justification for non-delivery to the consignee. Whenever the right in question exists, and notice has been given to the carrier, after he has received the goods for carriage, and during their transit, not to deliver them over, the carrier is not only excused for non-delivery to the consignee, but he is also subject to an action, if, after such notice and tender of the freight, he should refuse to re-deliver the goods. The effect of the notice and tender is to dispossess the consignee, and is so complete a re-vesting of the property in the consignor, that if the goods, notwithstanding the notice, are placed in the hands of the consignee, and are subsequently transferred to his assignees, in case of his bankruptcy, they will be subject to an action of trover for them at the suit of the consignor.[1]

§ 340. We proceed further to notice the right of *stoppage in transitu*, so far as the mode of exercising it, and the termination of it, are nearly allied to the duties and obligations of carriers. The principal question to be determined when the inquiry is as to the extent of the vendor's power to stop *in transitu*, as the technical phrase denotes, is the duration of the transit of the goods sold. The authorities which have been reviewed on the subject of delivery establish the proposition, that in all cases of the sale and transmission of goods, the *transitus* is at an end when the property comes either into the actual possession of the vendee, or arrives at that place, where, by his authority, it is destined for his use, or to await his orders. The consignee must have taken such actual or constructive possession of the goods as owner, in order to constitute a determination of the transit.[2] It is not

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[1] Little *v.* Cowley, 7 Taunt. R. 169; Stokes *v.* De La Rivière, cited in Bothlingk *v.* Inglis, 3 East, R. 397; Syeds *v.* Hay, 4 T. R. 260.

[2] See James *v.* Griffin, 2 M. & Welsb. R. 623; Dixon *v.* Baldwin, 5 East, R. 184; Edwards *v.* Brewer, 2 M. & Welsb. R. 375; Townley *v.* Crump, 4 Ad. & El. R. 58.

necessary, in order to divest the consignor's right to stop goods *in transitu*, that they should have been taken by the very hands of the consignee himself; they may be marked, for instance, by the provisional assignee, if a bankrupt, before arrival at the place where the consignee is in the habit of receiving them;[1] and in some cases common carriers, packers, and wharfingers, may stand in the character of agents for the purpose of receiving goods or holding goods; a delivery to whom would be equivalent to a delivery to the consignee himself.[2] The question always is, whether the party to whom the goods actually came be an *agent*, so far representing his principal as to make the delivery to *him*, a full, effective, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as carrier or means of conveyance to the principal, in a mere course of transit towards him.[3]

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[1] Ellis *v.* Hunt, 3 T. R. 464.

[2] Cross on Lien and Stopp. in Transitu, 371.

[3] Bolin *v.* Huffnagle, 1 Rawle, (Penn.) R. 9. Goods purchased by one at a distance and forwarded to a point, and there taken by a carrier of the purchaser, to be transported to the residence of the purchaser, may be stopped *in transitu* on the failure of the purchaser, and before they reach his residence. Buckley *v.* Farniss, 15 Wend. (N. Y.) R. 137. No case is found in the books precisely like, in its prominent circumstances, the case of Sawyer *v.* Joslin, in Vermont, (20 Vermt. R. 172.) In that case it appeared, that goods were shipped at Troy and directed to the vendee at Vergennes, and were landed upon the wharf at Vergennes, which was half a mile from the vendee's place of business; and it was proved, that the wharf was the usual place of the vendee's receiving the goods in that town, and that, after they were landed upon the wharf, neither the wharfinger nor any person for him, or for the carriers, had any charge of the goods, but that it was usual for the vendee, and others who received goods at that wharf, to receive the goods upon the wharf and transport them to their places of business; and it appeared that the goods were not subject to any lien for freight or charges. It was held, that the wharf was the place of ultimate destination of the goods intended by the consignor; and that the goods, when landed there, came into the constructive possession of the vendee, and were beyond the bounds of the vendor's right of stoppage *in transitu*.

§ 341. If a man be in the habit of using the warehouse of another, whether that of a carrier or wharfinger, as his own, making it a depository of his own goods, and disposing of them there, the transit terminates with the arrival of the goods at such depository.[1] But this must be understood as extending only to the instances where a delivery into the warehouse has been perfected, or the consignee has obtained entire control over the goods, prior to his insolvency. Thus, the mere arrival of a ship at a wharf, without any delivery of the goods out of the hold of the ship, is not sufficient to constitute a termination of the transit, even though the wharf be customarily used by the consignee as the place of deposit for the goods shipped by his direction.[2] Under such circumstances it has been expressly held, that there is not such a delivery to, or appropriation made by the consignee, as to deprive the consignor of the right of stoppage *in transitu*.[3]

§ 342. A mere commencement of delivery, not so far completed as to enable the consignee to take actual possession, cannot be construed into a determination of the transit. Where a quantity of iron was delivered to a carrier to be conveyed to a vendee, and the carrier having reached the vendee's premises, landed a part of the iron at his wharf, but finding that he had stopped payment, reloaded the same on board his barge, and took the whole of the iron to his own premises; it was held, that there was no delivery of any part of the iron so as to divest the consignor of his right to stop *in transitu;* the special property remaining in the carrier until the freight was paid or tendered for the whole cargo, or until he had done some act showing that he assented to

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[1] Rowe *v.* Pickford, 8 Taunt. R. 83; and see Hurry *v.* Mangles, 1 Campb. R. 452.

[2] See *ante*, § 300.

Tucker *v.* Humphrey, 4 Bing. R. 516.

part with the possession of the goods without payment of the freight.[1]

§ 343. If an agent be merely clothed with a specific and limited authority to forward the goods to a particular destination, the transit is not determined until the goods have reached the place named by the buyer to the seller as such destination; for, in such case, the warehouse of the agent is the mere resting place for the goods.[2] And if goods, in the course of their journey, reach the hands of an agent thus confined to a particular order of destination, the case will not be varied by the circumstance that he has paid the dues on the carriage. As where an agent at Southampton, acting under a general authority from a draper at Guernsey, to forward to him there all goods which arrived to his direction at Southampton, received, in consequence, a quantity of goods, upon which he paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods; it was held, that the transit was not ended at Southampton, but that the vendor might stop them after they had been put on board the vessel for Guernsey.[3]

§ 344. The delivery to an agent not invested with any direction as to the further transit of the goods, may be rendered incomplete, by conditions annexed by the vendor at the time of the delivery.[4] For, although, upon an absolute delivery of goods to a packer of a purchaser, who has no warehouse of his own, the transit is in general at an end; yet if the goods be delivered to him upon the understanding that they are to be paid for in ready money, he becomes a trustee for the vendor, and it would contravene his duty to deliver them to the purchaser until paid for accordingly.[5]

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[1] Crawshay *v.* Eades, 1 B. & Cress. R. 181.

[2] Coates *v.* Railton, 6 B. & Cress. R. 422; and see *ante*, § 75.

[3] Nicholls *v.* Le Feuvre, 2 Bing. New R. 81.

[4] Owenson *v.* Morse, 7 T. R. 64.

[5] Loeschman *v.* Williams, 4 Campb. R. 181; Goodhall *v.* Skelton, 2 H. Bl. R. 316.

§ 345. But in the instances in which it has been said, that the goods must come to the corporeal touch of the vendee, in order to oust the right of stopping *in transitu*,[1] it is a figurative expression, rarely if ever true.[2] If it be predicated of the vendee's actual touch or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch they actually come, be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to, or on account of, the principal, in a mere course of transit towards him. If the transit be once at an end, the delivery is complete, and the *transitus* for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination.[3] Hence, where by arrangement an intermediate delivery occurs before the goods reach their ultimate destination, it becomes necessary to inquire whether the party to whom they are so delivered is invested with the power to receive them, and to alter their destination; or is a mere agent to see them forwarded in accordance with original directions. If invested with a general and unlimited authority in this respect, the *transitus* ends on the arrival of the goods into his hands, for, as between the buyer and the seller, this is the ulterior delivery in view.[4] It is not merely a constructive but an actual delivery.[5] The distinction here made is not in discordance with the two preceding sections.

§ 346. It was formerly ruled, that a completion of the

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[1] See Ellis *v.* Hunt, 3 T. R. 464.

[2] See Cross on Lien and Stopp. in Trans. 371, 372; Whit. on Lien, 206.

[3] Cross, *supra;* Dixon *v.* Baldwin, 5 East, R. 184; Jackson *v.* Nichol, 5 Bing. New R. 508.

[4] Leeds *v.* Wright, 3 Bos. & Pull. R. 320; Scott *v.* Pettit, Ib. 469.

[5] Cross, *supra.*

journey was necessary to defeat the right of a vendor to stop *in transitu*, or to re-seize goods on non-payment of the price, and the insolvency of the buyer.[1] But in a later case than the one referred to, Lord Alvanley expressed himself to be directly opposed to that doctrine which was laid down by Lord Kenyon. "If," said he, "in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. So, though it has been said, that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road, and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage."[2] In conformity with this opinion of Lord Alvanley is the judgment of Chambre, J., who had little doubt that if the consignee intercepts the goods in their passage, before the consignor has exercised his right of stopping *in transitu*, and they are actually delivered from the carrier before they get to the end of the journey, such a delivery to the consignee will be complete.[3]

§ 347. It is not, therefore, a necessary consequence, that because, when a person orders goods to be delivered at a particular place, the *transitus* continues in general until they have been delivered accordingly, the consignee may not, under any circumstances, anticipate the delivery.[4] If, for instance, before the goods reach their ultimate destination, a vendee directs a postponement of their delivery, or does any other act equivalent to taking possession of them, the

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[1] Holst *v.* Pownal, 1 Esp. R. 240.

[2] Mills *v.* Ball, 2 Bos. & Pull. R. 461.

[3] Oppenheim *v.* Russel, 3 Bos. & Pull. R. 42. See also the doctrine of Lord Kenyon repudiated in Foster *v.* Frampton, 6 B. & Cress. R. 107.

[4] See Cross on Lien and Stopp. in Trans. 381.

transitus may be previously determined. Thus, taking samples from the whole stock, and directing the carrier to keep the goods in his warehouse until he receives further directions, constitutes the carrier the consignee's warehouseman; and his possession is as much the possession of the consignee as if the latter had taken the whole bulk into his own warehouse.[1]

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[1] Foster *v.* Frampton, *ub. sup.*

CHAPTER IX.

OF THE RIGHTS OF CARRIERS — RIGHTS OF POSSESSION, OF LIEN, AND OF ACTION FOR FREIGHT.

§ 348. By virtue of the delivery of goods to a carrier for transportation, there is vested in him a *special property*, which, in the first place, authorizes him to maintain an action against any person who disturbs his possession of, or does any injury to, the goods; and the reasons are, that he has an interest in the transportation, and is responsible for injuries to the goods by loss or otherwise, during their transit.[1] It is an old doctrine, that every bailee has a temporary *qualified* property in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action, or an appeal in his own name, against any stranger who may damage or purloin them.[2] Mr. J. Story deduces from the numerous authorities he has cited, in his work on Bailments, as the true doctrine, "that every bailee ought have a general right of action against mere wrongdoers to the property, while in his possession, whether he has a special property therein or not, because he is answer-

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[1] Bac. Abr. Contract, C.; Goodwin *v.* Richardson, Roll. Abr. 5; 1 Ld. Raym. R. 278; Wilbraham *v.* Snow, 1 Ventr. R. 52; 2 Saund. R. 476, and 2 Ib. 47, n. cited in Story on Bailm. § 585. "If a common carrier has goods delivered to him to carry to a place, and a stranger takes them out of his possession, and converts them to his own use, an action of trover and conversion lies by the carrier against him; for he has a special property in the goods, and is to give satisfaction to the owner for them." Per Brampt., C. J., in Goodwin *v.* Richardson, *ub. sup.*

[2] Year Book, 21 Hen. VII., 14 *b*, 15 *a*, cited in Jones on Bailm. 80; and see 2 Bla. Comm. 452, and Story on Bailm. § 93, *et seq.*, and *Ante*, § 4.

able over to the bailor; for, (as it has well been said,[1]) a man ought not to be charged with an injury to another, without being able to resort to the original cause of that injury, and in amends thereof to do himself right."[2] For the reason that the owner or the master of a vessel is liable for goods he has to transport, which are wrongfully detained by revenue officers, he has a remedy over against the officers for such illegal detention."[3]

§ 349. The carrier's property in the goods is not absolute, for the very obvious reason, that his contract is for restitution.[4] As a general rule, therefore, he has no right to sell or dispose of the goods intrusted to him for transportation. Accordingly, if the master of a vessel make a new bill of lading of the goods on board, in his own name as owner, and the goods are sold to one who was ignorant of the fraud, the real owner may sue the purchaser for their value and recover.[5]

§ 350. Where certain carriers by water of a quantity of salt, in Indiana, purchased a boat on their way to ascend the river towards the place of destination, and deposited with the seller a part of the load as security for the price of the boat, informing him they were carriers; it was held, that such disposal of the property was unauthorized, and that the right to the possession of it continued in the original

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[1] Bac. Abr. Bailment, D.

[2] Story on Bailm. § 93*f*; and see Waterman *v.* Robinson, 5 Mass. R. 303.

[3] Action against the owner of a vessel, for non-delivery of ten pipes of wine. The ship was detained at Jamaica, for a supposed violation of the revenue laws, but on appeal, the sentence of condemnation was reversed, and it was said by Lord Ellenborough, "You have an action against the officers. The shipper can only look to the owner or master of the ship." Gosling *v.* Higgins, 1 Campb. R. 451.

[4] See Story on Bailm. § 93; Swift *v.* Moseley, Vermt. R. 349.

[5] Salters *v.* Everett, 20 Wend. (N. Y.) R. 275.

owner, and that a *bonâ fide* purchaser of goods out of *market-overt*, could not hold against the true owner.[1]

§ 351. In the above case the purchaser from the carriers was told that they were carriers, and he was thereby put on his guard. But it was contended in a case in Pennsylvania, that a wagoner had such a special property in the goods which were sent by him to be delivered to a certain person, as authorized him (the carrier) to dispose of them; and the ground taken was, that the party who places confidence in another, should be the loser by his breach of faith, and not an innocent purchaser. But the Court held, that although the carrier is vested by law with a special property, by virtue of which he may maintain an action against a wrongdoer, yet that special property does not impair the general property of the true owner, or give to the carrier an authority to sell. In Pennsylvania there are no markets *overt*, by a sale, in which the property can be altered; so that a sale by a carrier of goods intrusted to him, in the street at Pittsburg, gave no additional validity to the transaction.[2]

§ 352. So, a carrier by sea, although he has, by the law merchant, a lien on goods carried by him for the payment of freight, yet he has no right, of his own mere motion, to cause a sale for the payment of freight;[3] and a carrier by sea and a carrier by land stand in the same relation to the owner of the goods.[4]

§ 353. If the carrier is instructed to sell the goods he undertakes to carry, at a certain price, or to store them, without any stipulation as to payment of freight, he may

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[1] Kitchell *v.* Vanador, 1 Blackf. (Ind.) R. 356.

[2] Lecky *v.* M'Dermott, 8 S. & Rawle, (Penn.) R. 500. The decision in this case confirmed in Rapp *v.* Palmer, 3 Watts, (Penn.) R. 178.

[3] Hunt *v.* Haskell, 11 Shep. (Me.) R. 339.

[4] Saltus *v.* Everett, 20 Wend. (N. Y.) R. 267.

demand the freight from the warehouseman on delivery; but, it will be a conversion, if, without such demand, he stores the cotton as his own; and if he refuses to deliver the goods for any other cause than the non-payment of freight, he cannot avail himself of the want of a tender of the freight.[1]

§ 354. It is clearly, however, an exception to the general rule, that the master of a ship in foreign parts may hypothecate or even sell the cargo, as well as the ship, when absolutely necessary to enable him to continue his voyage. In such case of necessity, it has always been held, says Lord Tenterden, that the master, if he cannot otherwise obtain the money, may sell a part of his cargo to enable him to convey the residue to the destined port;[2] and the same doctrine has been fully recognized by the Courts of this country.[3] In case of wreck or stranding, if the master have no means of transshipment, he has a right to sell, but the great necessity of it must clearly exist.[4] The acknowledged rule is, that the mere shipment of merchandise does not confer on the master of the vessel authority to dispose of the goods, and in case of necessity, the burden of proof showing the necessity lies upon the purchaser.[5]

§ 355. The usage of trade may also operate to take the

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[1] Blair *v.* Jeffries, Dud. (S. C.) R. 59.

[2] Abbott on Shipp. 164; where, in consequence of damage to a ship during the voyage it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested: and a person employed by him to superintend the sale may lawfully pay over the proceeds to him, or to his order. Ireland *v.* Thompson, 4 Man. Grang. & Scott, R. 149.

[3] Ibid. note, p. 165, referring to American cases.

[4] See *ante*, note 4 to § 187, p. 188; United States Ins. Co. *v.* Scott, 1 Johns. (N. Y.) R. 106.

[5] Saltus *v.* Everett, 20 Wend. (N. Y.) R. 267; Myers *v.* Baymore, 10 Barr, (Penn.) R. 114.

case from the application of the general principle, that a sale by a carrier vests no title; as if it be the usage for the carrier to act as an agent for the sale of the goods intrusted to him for carriage.[1] But the usage, to have this effect, must have every requisite to give it validity; that is, it must be long established, certain, uniform, and reasonable.[2]

§ 356. But the right of *common carriers*, which to them is of the most importance, consists of one of the methods prescribed by the law for the recovery of their hire. They are bound, as has already appeared, to carry goods for a reasonable reward, unless their vehicle be already full, or the risk sought to be imposed upon them be extraordinary, or the goods be of such a nature as they cannot convey, or are not in the habit of conveying; and in case of refusal are liable to an action. Still if goods are brought to them for the purpose of conveyance, no action will lie against them for refusal to accept them, unless there was at the time an offer of the carriage price.[3] If they undertake to carry them without having been previously paid, the law presumes that they consider the possession of the goods as a sufficient security for their expected remuneration; and, in conformity with this presumption, it authorizes them to retain this possession at the end of the transit, until they have received satisfaction for their labor, &c.; and this is the foundation of a *lien*.[4] If

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[1] *Ante*, § 104 – 107.

[2] Rapp *v.* Palmer, 3 Watts, (Penn.) R. 178; and see *ante*, § 106. "If a man," says Bayley, J., in Pickering *v.* Buck, 15 East, R. 44, "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell;" and the cause was decided on that ground.

[3] See *ante*, § 124; Cross on Lien, &c. 282; Jackson *v.* Rogers, 2 Show. R. 327; Lane *v.* Cotton, 1 Ld. Raym. R. 646; Edwards *v.* Sherratt, 1 East, R. 60; Riley *v.* Horne, 5 Bing. R. 217; Batson *v.* Donovan, 4 B. & Ald. R. 11; Cole *v.* Goodwin, 19 Wend. (N. Y.) R. 234.

[4] See Jones on Carr. 99; Story on Bailm. § 588. It has appeared that there has been a degree of discrepancy in opinion as to whether private

this security is waived, by a delivery of the goods before the payment of the hire, recourse must then be had to an action for its recovery; or for the recovery of what is denominated *freight.* It is proposed, therefore, to consider, 1st, the right of the carrier before the goods are delivered over; and, 2dly, his right after the possession has been parted with.

§ 357. *First.* — LIENS are either by the *Common Law*, *usage*, or *agreement*, and are of two denominations — the one a *particular* or *specific* lien, given by the policy of the Common Law, and the custom of the realm, and attaching only upon the specific chattels, for the unpaid price, or carriage thereof, or for work and labor bestowed thereupon; the other, a *general* lien, authorizing detention of the goods, not only for demands arising out of the article retained, but for a general balance of accounts, relating to dealings of a like nature. The latter is an encroachment upon the Common Law, and has consequently been regarded by Courts with much jealousy. Hence is it that, in the absence of some general usage affecting the custom of the realm, or an express agreement between the contracting parties, or evidence to show that such was their common mode of previous dealing, a further extension of the general privilege has met with much discouragement, and a jury is warranted in negativing any right beyond the specific lien to which parties are entitled at Common Law.[1] As it has been held, in New Jersey, a

carriers, or carriers for hire, who are not common carriers, have a lien on the goods carried for the carriage. *Ante*, § 66. But it has long been held, that common carriers have a lien. Skinner *v.* Upshaw, 2 Ld. Raym. R. 752; and for American cases recognizing the doctrine, see Goodman *v.* Stewart, Wright, (Ohio) R. 216; Heywood *v.* Middleton, 1 Const. (S. C.) 186; Slater *v.* Gaillard, Ib. 428. Although a consignee, on a bill of lading, acquires a property in the consignment, and may sell while the goods are in transit, and the goods have not been paid for, the carrier has a right to retain possession of the goods against the consignee until the carriage is paid for. Jordan *v.* James, 5 Ohio R. 88. And see Bowman *v.* Hilton, 11 Ib. 303.

[1] Cross on Lien, &c. 15; Rushforth *v.* Hadfield, 6 East, R. 522.

common carrier has a lien on goods in his possession, but *primâ facie* only for the transportation of those particular goods, and not for the transportation of other goods also, which do not remain in his possession.[1]

§ 358. To establish a general lien on the ground of usage, strong and satisfactory evidence must be adduced of ancient, numerous, and important instances in which the right has been exercised.[2] Therefore, where the jury found, that the plaintiffs had no knowledge of such usage, though there was proof, unopposed by other evidence, of its having been exercised by the defendants and various other common carriers throughout the neighborhood, for ten or twelve years before, and in one instance so far back as thirty years, the Court refused to grant a new trial.[3] When, on the other hand, the usage is general, and prevails to such an extent that all parties contracting may be supposed conusant of it, the usage then becomes evidence of a contract, or raises a presumption that the parties contracted with reference to it.[4]

§ 359. As common carriers are bound to carry goods for a reasonable reward, it might reasonably be supposed, that, in their case, a more favorable and extended construction than that above mentioned would have been put upon the doctrine of lien. On the contrary, the lien of a common carrier for his general balance is never favored, unless arising in point of law from an implied agreement to be inferred from the general usage of trade, proved by numerous clear and satisfactory instances; and a few recent instances are insufficient to establish the requisite proof of it.[5]

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[1] Hartshorne *v.* Johnson, 2 Halst. (N. J.) R. 108.

[2] A doctrine which applies to commercial usage generally, *ante*, § 229, 301.

[3] Rushforth *v.* Hadfield, *ub. sup.*

[4] Holderness *v.* Collinson, 7 Barn. & Cress. R. 212; Rex *v.* Humphrey, 1 M'Clel. & You. R. 191.

[5] Rushforth *v.* Hadfield, *ub. sup.*

§ 360. By express stipulation with their customers, carriers may undoubtedly secure to themselves a general lien; and a promulgation by a carrier of a notice to that effect, it is said, might subject the goods of a customer cognizant of the notice, to be detained for a general balance due from him.[1] But in Kirkman *v.* Shawcross,[2] Lord Kenyon declared, that common carriers have no right to say, that they will not receive any goods but on their own terms. He said further, however, be that as it may, when a common carrier has given notice that he would not be answerable for goods of a particular denomination, unless he received a certain premium, and that notice has come to the knowledge of the party suing, the Courts have considered it as an agreement binding on both parties. And it is strongly implied in Rushforth *v.* Hadfield,[3] that a common carrier may, on the same principle, create a general lien as against the person who employed him, by means of notice.[4]

§ 361. Where a carrier had given notice, that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners, it was held that this notice did not authorize him to retain the goods of the principal for a general balance due to him from the factor, though they were addressed to the latter.[5] Even if the notice, in this case,

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[1] Cross on Lien, &c. 283. See Abbott on Shipp. 286. An agreement entered into by a number of dyers, pressers, &c. at a public meeting, that they would not receive any more goods to be dyed, but on condition that they should have respectively a lien on those goods for their general balance, is good in law; and any one, who, after notice of it, delivers goods to either of those persons, must be considered as having assented to those terms, and cannot demand his goods until he has paid the balance of his general account. Kirkman *v.* Shawcross, 6 T. R. 14.

[2] Kirkman *v.* Shawcross, *ub. sup.*

[3] Rushforth *v.* Hadfield, 6 East, R. 224.

[4] Kent considers that it is a point still to be settled by judicial decision. 2 Kent, Comm. 637. See note by Metcalf to p. 67 Yelv. R.

[5] Wright *v.* Snell, 5 B. & Ald. R. 350.

had been that all goods, to whomsoever belonging, should be subject to a lien for every general balance due from the person to whom they were addressed, it seems doubtful[1] whether it would have been of any avail; for Holroyd, J., there said, that a factor cannot by any agreement, either express or implied from the course of dealing, subject the property of his consignor and employer to the payment of his own debts; and Best, J., doubted whether a carrier could make so unjust a regulation.[2]

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[1] Jones on Carr. 101.

[2] Doubts have been entertained how far this decision may have been affected, had the notice been more comprehensive in its terms, and included the goods, not only of the respective owners, but of every person, to whomsoever addressed; and whether, in such case, the carrier might not have been entitled to a general right of detention against all parties. Cross on Lien, &c. pp. 283, 284. With the view to enable such enlargement of power, Mr. Chitty, in his Practice of the Law, (vol. 1, p. 493,) has suggested the expediency of introducing words to the effect, "that the goods of all persons dealing with the party in his trade, and whether belonging to the customer, *or to any other person or persons, or in which he is in any respect interested*, whether for a lien or otherwise, or which may be in the possession of the advertiser, or whether going to or from his manufactory or premises, must be understood to be, and will be, subject to a general lien for all moneys due to the advertiser, as well from the customer, as from any person or persons entitled to or interested in such goods." But it is considered (Cross on Lien, &c. p. 284,) doubtful if such notice would be effectual. "To grant the validity of so extensive a claim, would be to allow, by special agreement, a power against third parties not recognized by the Courts, even though sanctioned by immemorial custom, (Leuckhart *v.* Cooper, 3 Bing. N. C. 99;) for to give validity and effect to usage, it has been decided that it must be reasonable as well as ancient, and it can scarcely be contended, that the detention of the goods of the consignor, for the debt of the consignee, is either just or reasonable (Ib.) The principle of such decision should therefore, and probably would, regulate the judgment, were the question suggested to come before the Court. The precautionary measure proposed in the form of notice, may, at least, be pursued, *majori cautelâ;* but, to permit the annexation of terms so inconsistent with the general principle, that carriers are compellable to carry the goods of all customers, for reasonable reward, would at once be an abrogation of the rule, and a permissive power vested in carriers, which immemorial custom has not been able to

§ 362. It has been decided, that if there be an agreement for a general lien between the carrier and the consignee, this will not affect the right of stoppage *in transitu* inherent in the consignor; and therefore the consignor, upon giving notice of his intention to exercise this privilege, will be entitled to a re-delivery, upon the payment of the carriage price of the particular consignment.[1] As has already been illustrated, the delivery to the carrier is a qualified, not an absolute delivery to the consignee, and is good to all intents and purposes, except that of defeating the right of the consignor to stop *in transitu*. It is such as to give the latter a right of resuming possession at any time before the goods come into that situation which gives the consignee a complete dominion over them.[2]

§ 363. It is laid down by a late writer,[3] and other elementary writers who have preceded him, that the *obligation* of carriers to receive and carry goods for hire, exempts them, as in the case of innkeepers, from any necessity to inquire into the title of the parties delivering them; and that for this reason, they may retain them against the true owner until the particular carriage be paid, though the true owner

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establish in others." "I should doubt," observed Best, J., (Wright *v.* Snell, *ub. sup.*) "if any form of words would be able to establish a liability of such kind. It is however sufficient, (says he) in the case before the Court, to say, that the plaintiff is the owner of the goods, and there being nothing due from him to the carriers, the words of the notice do not impose any liability upon him. If any question should arise, falling within the terms of the notice last given, *it would be very fit to consider whether a carrier can make so unjust a regulation as is there attempted.*" The notice alluded to was, that all goods, from whomsoever received, or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that might be due from the person to whom they were consigned or addressed.

[1] Oppenheim *v.* Russell, 3 Bos. & Pull. R. 42.

[2] See *ante*, § 339, *et seq.*

[3] Cross on Lien, &c. 286.

prove that they were stolen from him by the person who delivered them to be carried. The only authority which has been generally relied on for this doctrine, is the old case of Yorke *v.* Grenaugh, in the trial of which Lord Chief Justice Holt presided;[1] and as its authority has been, in one instance, repudiated in this country, it is proper it should be stated more circumstantially than it has been. The decision was, that if a horse be put up at the stable of an inn by a guest, the innkeeper has a lien on the animal for its keep, whether the animal be the property of the guest or of some third party from whom it has been fraudulently taken, or stolen. It was excepted by the counsel that, "since the horse was brought to the inn by a stranger, the innkeeper cannot detain it for its meat against the right owner; for it may be that this traveller was a wrong-doer, or a robber." But the answer of the Court was: "Supposing that this traveller was a robber, and had stolen this horse; yet if he comes to an inn, and is a guest there, and delivers the horse to the innkeeper, (who does not know it,) the innkeeper is obliged to accept the horse; and then it is very reasonable, that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider, who is owner of the horse, but whether he who brings him is his guest or not." Lord Chief Justice Holt cited the case of an Exeter common carrier; "where A. stole the goods, and delivered them to the Exeter carrier, to be carried to Exeter, the right owner finding the goods in possession of the carrier demanded them of him, upon which the carrier refused to deliver without being paid for the carriage. The owner brought trover, and it was held, that he might justify detaining against the right owner for the carriage; for when A. brought them to him, he was obliged to receive them, and carry them; and *therefore*, since the law compelled him to carry them, it will give him remedy for the premium due for the carriage.[2]

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[1] Yorke *v.* Grenaugh, 2 Ld. Raym. R. 867.

[2] The Reporter says, the doctrine had always been maintained by Holt;

§ 364. The doctrine, that a common carrier and a common innkeeper may have a lien on property delivered to them, because the one is bound to receive goods which are offered for transportation, and the other is bound to receive guests with their effects, it has been said, rests upon the authority alone of the above case of Yorke *v.* Grenaugh.[1] But it was held, in Johnson *v.* Hill, at *nisi prius*, in 1822, that if A., under color of legal proceeding, wrongfully seize the horse of B., and take it to an inn where it is kept for several days, the landlord has a lien upon the horse for the keep, and may, therefore, refuse to deliver up the horse to B., until the keep is paid; *unless the landlord knew that A. was a wrong-doer in seizing the horse.*[2] Then again, there is said to be an obvious ground of distinction between the cases of *carrying goods* by a common carrier, and furnishing *keeping* for a horse by an innkeeper; that, in the latter case, it is equally for the *benefit* of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by a thief or by himself or agent; in either case food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him.[3]

§ 365. In the Supreme Court of Michigan, in 1843, it was

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and that a common innkeeper may detain a horse brought by a wrong-doer against the true owner, he cites 3 Bulstr. R. 269, and 1 Roll. R. 449. The doctrine is stated thus, by Mr. Metcalf in his learned note in Yelverton, R. on the authority of Yorke *v.* Grenaugh, *ub. sup.*

[1] Fitch *v.* Goodell, &c. 1 Doug. (Mich.) R. 1.

[2] Johnson *v.* Hill, 3 Stark. R. 172. If a person is stopped with a horse under suspicious circumstances, and the horse is placed at an inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owner of the horse. Binns *v.* Pigot, 9 C. & Payne, R. 208.

[3] Fitch, &c. *ub. sup.*; Abbott, C. J., in Greenway *v.* Fisher, 1 C. & Payne, R. 190, simply says:—"As to a carrier, if, while he has goods, there be a demand and refusal, trover will lie." He does not say but that a carrier, may, in all cases, have a lien.

expressly held, contrary to the reasoning of the Court in Yorke *v.* Grenaugh, and to the decision in the Exeter case there cited by Lord Chief Justice Holt, that the doctrine of *caveat emptor* applies, with the same force, to common carriers as to other persons; and that if common carriers, in any way, acquire possession of property without consent of the owner, they, like other persons, may be compelled to restore it to such owner; and that the obligation of a common carrier to receive and carry all goods offered, was subject to the condition that the person offering the goods has authority to do so. The Court reasoned (and it is submitted if there be not force in the argument) that if a common carrier is in all cases entitled to demand the price of carriage before he receives the goods, and which, if not paid, he may refuse to take charge of them, and if he may reject goods offered by a wrong-doer; he is bound to take care, that the person from whom he receives them, has authority to place them in his custody. In this case, the plaintiffs, by their agents, shipped goods at Port Kent, on Lake Champlain, consigned to them at Mashall, Michigan, care of H. C. & Co., Detroit, by the New York and Michigan Line, who were common carriers, and with whom they had previously contracted for the transportation of the goods to Detroit, and paid the freight in advance. During the transit of the goods, and before they reached Buffalo, they came into the possession of carriers doing business under the name of the Merchants' Line, without the knowledge or assent of the plaintiffs, and were by them transported to Detroit, and consigned to H. P. & Co., of Buffalo, to the care of the defendants, and delivered to the defendants, who were personally ignorant of the manner in which they came into the possession of the Merchants' Line, and of the contract of the plaintiffs with the New York and Michigan Line; although they, and also H. P. & Co. were agents for, and part owners in, the Merchants' Line. The defendants being warehousemen and forwarders, received the goods and advanced the freight upon them from Troy, New York, to Detroit. On demand

of the goods by the plaintiffs, the defendants refused to deliver them, until the freight advanced by them, and their charges for receiving and storing the goods were paid; claiming a lien on the goods for such freight and charges. It was held, in an action of replevin brought for the goods, that the plaintiffs were entitled to the possession of the goods, without payment to the defendants of such freight and charges; and that the defendants had no lien upon the goods for the same.[1]

§ 366. In the above case, the case of Buskirk *v.* Purington, in New York, was relied on as authority. There property was sold upon condition; the buyer failed to comply with the condition, and shipped the goods on board the vessel of the defendants. On the defendants' refusal to deliver the goods to the owner, he brought trover, and was allowed to recover their value, although the defendants insisted on their right of lien for the freight.[2]

§ 367. There was a fraud committed upon the true owner of the goods in the case of King *v.* Richards, in Pennsylvania:[3] and the decision of the Court in that case was, that where A. had delivered goods to a common carrier, which he had fraudulently obtained from the true owner, the carrier might prove, in an action against him by A., that the goods had been obtained from the true owner, and that, upon demand made, he had delivered them up to the latter. But in giving their opinion, by Kennedy, J., the Court say, that it is sufficient in such cases for the bailee, that *he is authorized by law to retain the goods in his possession until he is paid or tendered the amount of what he is entitled to for*

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1 Fish, &c. *v.* Newberry, &c. 1 Doug. (Mich.) R. 1, and *ub. sup.*

2 Buskirk *v.* Purington, 2 Hall, (N. Y.) R. 561. The decision in this case confirmed in Collman *v.* Collins, Ib. 569.

3 King *v.* Richards, 6 Whart. (Penn.) R. 418; and see the case cited *ante*, § 337, and the cases cited in connection with the point decided, § 336.

keeping or carrying them. So that, in this case, the doctrine laid down in Yorke *v.* Grenaugh, is clearly recognized. The title of the true owner to recover, seems indeed to have been considered quite clear in Yorke *v.* Grenaugh, if he had only, anterior to the commencement of his action, *tendered to the defendant the money due* for the keeping of the horse, in the one case, or the sum due for the freight of the goods, in the other.[1]

§ 368. The lawful possession of goods being once acquired for the purpose of carriage, the carrier is not obliged to restore them to the owner again, even if the carriage be dispensed with, unless upon being paid his due remuneration; for by the delivery he has already incurred certain risks.[2] If a person go to a coach office and direct that a place be booked for him by a particular coach, and that be done, and he leaves his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but if the party merely leave his portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all.[3] But cases of this sort depend much upon the circumstances. A contract was made in South Carolina during the war, with a wagoner, to carry a load of cotton from Lancaster to Richmond, at a specified sum per hundred,

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[1] In the Court of Queen's Bench, January, 1840, it was held, that where a person brings a *carriage* to an hotel, at which he stops as a guest, the hotel keeper has a lien upon the carriage for its standing room, and any labor bestowed upon it: the innkeeper is not bound to inquire whether the carriage really belongs to the guest, but if he received it *bonâ fide, he may retain it against the real owner*, however the guest may have obtained possession of it; but whether he has a lien for the whole bill incurred by the guest, *quære*. Turrill *v.* Crawby, 13 Jur. 878, and Law Rep. (Boston) for January, 1850, p. 478.

[2] Story on Bailm. § 685; Columbian Ins. Co. *v.* Ashby, 13 Peters, (U. S.) R. 331; Herbert *v.* Hallett, 3 Johns. Cases, 93.

[3] Higgins *v.* Bretherton, 2 Carr. & Payne, R. 2.

for transportation. The carrier attended at the place, and while loading his wagon with the defendant's cotton, news of peace arrived, and he determined not to send the cotton, and made the plaintiff unload. It was held, that an action would lie for the price of carrying the cotton.[1] In one case it appears that the detention can only be for the amount incurred for carriage; as where goods were taken by the owner from the carrier's wagon, it was held, that the carrier had no claim for booking;[2] and consequently he could set up no lien before delivery.

§ 369. As the rights as well as the liabilities of carriers by land, extend, in the absence of any statute to the contrary, to carriers by water, the owners or masters of general ships and vessels, both on the high seas and on navigable rivers and canals, are entitled to the same particular lien for the price of the carriage of goods delivered to them for transportation; and it is so both by the Common Law and by the written maritime codes of Europe.[3]

§ 370. But according to the principle by which all liens by the Common Law are regulated, if the master of a vessel once part with the voluntary possession of the goods out of his own or his agent's hands, he loses his lien upon them, and is not authorized by law to reclaim them.[4] The intention to relinquish the possession must, however, be clearly manifested. The captain of a ship was allowed a lien on a part of a cargo which had been removed into a lighter along side of the ship sent by the vendee, but which the captain afterwards fastened to the ship's side, to prevent its final removal.[5]

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[1] Davis *v.* Crawford, 4 Const. (S. C.) R. 401.

[2] Lambert *v.* Robinson, 1 Esp. R. 119.

[3] Abbott on Shipp. Pt. 4, ch. 2, p. 284.

[4] Ibid. p. 246; Artaza *v.* Smallpiece, 1 Esp. R. 23; Bigelow *v.* Heaton, 4 Denio, (N. Y.) R. 496.

[5] Soldergreen *v.* Flight, cited in Hanson *v.* Meyer, 6 East, R. 622.

§ 371. Where the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf, he does not thereby lose his lien on them for the freight. It is true, Lord Kenyon doubted whether the captain parted with his lien, under such circumstances;[1] but in Wilson *v.* Kymer,[2] it was expressly held, that the lien of the ship-owner for freight continued after the landing of the cargo at the West India docks, although he gave no notice to the company to retain the cargo until the payment of the freight. In England, if goods are placed in the West India or East India Company's Dock warehouses, the shipmaster may give notice to those bodies to detain them until the freight be paid.[3]

§ 372. Where goods are not required to be landed at any particular dock, and the common practice is to land them at a public wharf, and direct the wharfinger not to part with them until the charges upon them are paid; in such case the wharfinger becomes the ship-master's agent, and the goods remain constructively in the possession of the latter.[4]

§ 373. But the delivery of a portion of several parcels of goods belonging to one owner and carried on the same voyage, does not defeat a lien upon the remainder, for the whole freight.[5] But if there be two contracts to carry with different *termini* to the voyage in each contract, no lien attaches for freight under the one contract, upon goods shipped under

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[1] Ward *v.* Felton, 1 East, R. 507.

[2] Wilson *v.* Kymer, 1 M. & Sel. R. 157.

[3] Faith *v.* E. Ind. Co., 4 B. & Ald. R. 630; Horncastle *v.* Farran, 3 B. & Ald. R. 497. The London Dock Act, 45 Geo. 3, c. 58, s. 15, expressly reserves the lien for freight. By 6 Geo. 4, c. 107, s. 134, if goods are landed, and sold by the officers of the customs, the freight not having been paid, the produce of the sale is applicable, in the first place, to its liquidation. Abbott on Shipp., 300, and Cross on Lien, &c. 291, n.

[4] Abbott on Shipp. *supra.*

[5] Abbott on Shipp. 377; Cross on Lien, 290.

the other, and improperly detained on board by the carrier;[1] for in this, as in all other cases, no lien can be acquired by a possession which is unlawful; and hence no lien attaches if the goods directed to one place be improperly carried to another.[2]

§ 374. An exception to the rule, that a complete delivery will at all times divest the lien, is that if the possession be put an end to by fraud, the lien revives if possession be recovered.[3] And a common carrier who is induced to deliver goods to the consignee by a false and fraudulent promise of the latter, that he will pay freight as soon as they are received, may disaffirm and sue the consignee for possession, in replevin. It is like the delivery of goods to a fraudulent purchaser, or to a purchaser who receives the goods with an intent not to pay, which will avoid the sale.[4]

§ 375. The right of lien is not confined to freight and merchandise, but it extends to the baggage of a passenger, for the recovery of his passage-money; although the master has no lien on the passenger himself, or the clothes which he is actually wearing when about to leave the vessel.[5]

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[1] Bernal *v.* Pim, 1 Gale, R. 17; Soldergreen *v.* Flight, 6 East, R. 622.

[2] Wallace *v.* Woodgate, R. & M. R. 193; and see Abbott on Shipp. 377. If the freight is all consigned to the same person, and the master make a delivery of part of the goods to the consignee, he may retain the residue even against a purchaser, until payment of freight of the whole. But if the goods are sold to different persons by the consignee, and part is delivered, the master has not a lien upon the residue, so as to compel one purchaser to pay freight for what has been delivered to another purchaser; but only for what has been purchased by himself. See Soldergreen *v.* Flight, *ub. sup.*, and note 2 to p. 377, Am. Ed. Abbott on Shipping.

[3] Bigelow *v.* Heaton, 6 Hill, (N. Y.) R. 43.

[4] Bristol *v.* Wilsmore, 1 B. & Cress. R. 514; Ash *v.* Putnam, 1 Hill, (N. Y) R. 302, and the cases there cited.

[5] Wolf *v.* Summers, before Lawrence, J., at Guildhall, 2 Campb. R.

§ 376. The owner of a ship retaining the possession of it, has a lien on the cargo, for the hire, under a *charter-party*.[1] But it is necessary, that the party so retaining should be legally in possession of the ship; for a person cannot have a lien upon the goods who has not in law the possession of them;[2] and this depends upon the terms of the charter-party as explained by the intention of the parties apparent therein. By the stipulations contained in some charter-parties, the owners retain such a control over the ship as to be considered in the legal possession of the ship and goods during the voyage, by means of the master and crew as their servants; and consequently, on arriving at its destination, the goods on board being in the eye of the law in their possession, they have a lien for the stipulated hire of the ship. On the other hand, there are to be found instances wherein the charter-parties have contained such apt and comprehensive words of demise, that the possession has been thereby actually transferred from the owner to the charterer; in which case, not

631. In general, the law in relation to passage-money of passengers is the same as that respecting freight. Howland *v.* The Lavina, 1 Peters, (Adm.) R. 126. An *innkeeper* possesses only the right of specific lien for debts accruing contemporaneously with possession, and it was formerly considered, that he possessed not only a right of lien on the property of his guest, but a power of personal detention until payment. But this preposterous doctrine, supported only by the *obiter dictum* of Mr. Justice Eyre, in the case of Newton *v.* Tring, reported in 1 Show. R. 269, and the yet weaker authority of a case mentioned by Mr. Wentworth, in his Precedents, (see Cross on Lien, &c. 343,) has since been overruled in the recent case of Sunbolf *v.* Alford, 3 M. & Welsb. R. 148. Carriers of passengers both by land and water, being liable as common carriers for the baggage of the passengers, and being bound to receive it, their right of lien on the baggage must of course be admitted. As to the liability of carriers of passengers as common carriers of baggage, see *ante*, § 107, *et seq.*; 317, *et seq.*

[1] Abbott on Shipp. 289; Cross on Lien, &c. 300. See the judgment of Mr. Justice Richardson in Christie *v.* Lewis, 2 B. & Bing. R. 442; Lane *v.* Penniman, 4 Mass. R. 91; Portland Bank *v.* Stubbs, 6 Ibid, 422.

[2] See Jones on Carr. 102; Saville *v.* Campion, 2 B. & Ald. R. 503; and see Abbott on Shipp. 289, *et seq.*

having the possession, the former can exercise no right of lien over the goods. On this account, it is of much importance in every case, to ascertain in whom the possession is, in order to ascertain who is entitled to the lien.

§ 377. The broad principle formerly maintained that, in the case of a chartered ship, the charterer, during the existence of the charter-party, was, to all intents and purposes, the owner of the ship, and that, therefore, when goods were put on board by him in that character, the owner had no legal right to resume possession of the ship, until the goods were unloaded, and had consequently no right to detain the goods, has been much narrowed and qualified by subsequent decisions.[1] The Common Law now construes charter-parties as near as may be according to the intention of the parties, and not according to the legal sense of the terms of them. Where the ship is let for a term of years, and the lessee is to appoint and pay the master and crew and provide for the repairs, the possession passes to him.[2] But mere words denoting a demise of the ship do not necessarily preclude the conclusion, that the possession of the ship has continued in the owner himself. Thus, where the owner of a ship had entered into a charter-party with a freighter, by which the former "granted and to freight *let*," and the latter "*hired* and to freight took" for a voyage out and home; it was held, that taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner, notwithstanding the words of grant used in its commencement; and that the mere circumstance of his having entered into an agreement with the charterer as to the mode by which he should be paid for freight, did

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[1] Cross on Lien, &c. 301; and see Hutton *v.* Bragg, 7 Taunt. R. 14, since overruled, Saville *v.* Campion, 2 B. & Ald. R. 503, and Christie *v.* Lewis, 2 B. & Bing. R. 410, and Abbott on Shipp. 290–298.

[2] Fowler *v.* Kymer, 3 East, R. 396, and cited in Abbott on Shipp. 290; and see *ante*, § 89, 147.

not divest him of his lien on the cargo; and it made no difference that he had delivered the homeward cargo to the consignees, and received the freight due upon the bills of lading, which was different from that due on the charter-party.[1]

§ 378. On the other hand, although the charter-party contain no words of actual demise, there may be stipulations in it equivalent, in their effect, to an actual parting with the ship *pro hac vice*.[2] It is in fact to be regretted, upon a review of all the authorities respecting the ship-owner's lien for freight, "that great uncertainty has been introduced by their almost irreconcilable conflict, into the construction of contracts of charter-party. The maritime law, so far as it relates to the owners and masters of ships, is founded upon the principle, that the master is the servant of the owner. As such servant the master is intrusted with authority over the property in his charge much more extensive than that which the lessee of a vessel for a voyage or term could have power to delegate. By the Common Law, also, he possesses the same authority. By the master's contract with the sub-freighters, the owner of a chartered ship is bound — by his bottomry bond, the ship itself may be pledged to an extent much beyond the interest of the charterer — to him is intrusted the certificate of registry on which the names of the proprietors and the incumbrances on their property in the ship appear — for losses occurring through his misconduct and that of the mariners engaged by him, the 'owners' are responsible to the extent of the value of the ship and her freight; and yet when it becomes necessary to enforce the Common Law security for that, which alone makes the ship valuable to the owner — the freight earned by her — by dint

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[1] Christie *v.* Lewis, 2 B. & Bing. R. 410.

[2] Newberry *v.* Colvin (in error,) 1 Cr. & Jer. R. 192, 7 Bing. R. 190, overruling S. C. *nom.* Colvin *v.* Newberry, 8 B. & Cress. R. 163; and see Abbott on Shipp. 298, 299.

of subtle distinctions between the contract of *locatio rei et operarum* and the contract of *locatio operis*, the possession of the master is made out not to be the possession of the owner."[1]

§ 379. This highly vexed question, and so important in its consequences to the claim of lien, and the responsibilities of ownership, depending on the inquiry, whether the lender or hirer under a charter-party, be the owner of the ship for the voyage, it is a dry matter-of-fact question, who, by the charter-party, has the possession, command, and navigation of the ship. If the general owner retains the same, and contracts to carry a cargo on freight for the voyage, the charter-party is a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership. The general owner, in such case, is entitled to the freight, and may sue the consignee on the bills of lading in the name of the master; or he may enforce his claim by *detaining the goods* until payment, the law giving him a lien for freight. But when the freighter hires the possession, command, and navigation of the ship, for the voyage, he becomes the owner, and is responsible for the conduct of the master and mariners; and the general owner has no lien for the freight, because he is not the carrier for the voyage. This is the principle declared and acted upon in the greatly litigated and ably discussed case of Christie *v.* Lewis.[2] And it is the principle declared by the Supreme Court of the United States in Marcardier *v.* The Chesapeake Insurance Company,[3] and Gracie *v.* Palmer.[4]

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[1] Abbott on Shipp. 300, 301, (7th Eng. Edit. by Shee.)

[2] Christie *v.* Lewis, *ub. sup.*

[3] Marcardier *v.* Chesapeake Insur. Company, 8 Cranch, (U. S.) R. 49.

[4] Gracie *v.* Palmer, 8 Wheat. (U. S.) R. 605; Note by Mr. Shee to Abbott on Shipp. p. 302, (5th Am. edit.) And see the cases of the Schooner Volunteer, 1 Sumn. (Cir. Co.) R. 550; Certain Logs of Mahogany, 2 Ib. 589; Ruggles *v.* Bucknor, 1 Paine, (Cir. Co.) R. 358; and other cases cited by the American editors to Abbott on Shipp. (5th Am. edit.) note to p. 289.

§ 380. Although the exercise of the ship-owner's right of lien may be upheld in cases of doubtful construction, an express contract is the most sure ground upon which that right can rest.[1] He may reserve that right to himself by a full and unequivocal declaration of intention in the charter-party, that he shall retain the right of lien upon the lading of the vessel. This express contract amounts, in fact, to a covenant on the part of the charterer, that whatever may be the legal operation of the charter-party, as between themselves, the charterer's possession of the ship shall be the possession of the owner, so far as the right of the latter on the cargo is in any way concerned.[2] And if such lien be expressly reserved by a charter-party, it attaches on the goods, though assigned by the charterer, previous to their conveyance. Thus, where it appeared, that the owner of a ship had made such reservation, and the charterer had purchased the goods and put them on board, and subsequently transferred them, with a stipulation that they should be conveyed to their destination, it was held, that even against an indorsee of the lading, they were subject, not only to that particular freight, but to the ship owner's lien for a balance due to him under the charter-party, whether possession of the ship was, by the charter-party, completely out of the ship-owner, and vested in the charterer, or not.[3]

§ 381. No lien exists by virtue of unliquidated damages. Where the freighter of a ship, for instance, covenanted that if she should not be fully laden, he would not only pay for the goods on board, but for so much also in addition, as the ship would have carried, for which he had before stipulated to pay freight according to the different rates for three descriptions of goods; it was held, that the ship-owner had no lien upon the goods actually on board for the amount of

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[1] Abbott, &c. *supra*.

[2] Cross on Lien, 306.

[3] Small *v.* Moates, 9 Bing. R. 579, and cited in Abbott, &c. *supra*.

dead freight ; in other words, for the compensation in damages, which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated.[1]

§ 382. In replevin for tobacco, it appeared, that an agreement was entered into between A. M. and H. G. to execute a charter-party for a vessel, the defendant captain, from B. to A., but which charter-party was not executed. That H. G. put the tobacco on board the vessel, and afterwards sold it to the plaintiff, and gave an order for it on the defendant, who refused to deliver it, but insisted that the cargo should be completed, and that the vessel should proceed to perform the voyage, and that the *freight should be paid*, which H. G. and the plaintiff refused to do. It was held, that the defendant had no lien on the tobacco for freight, no freight being in fact due before the commencement of the voyage ; and that, if an injury had been sustained by the owner of the vessel, in consequence of the violation of the contract on the part of H. G., the proper remedy was to be sought by an action against him for the unliquidated damage.[2]

§ 383. Nor will a mutual obligation in a penal sum on the parties, the ship, the tackle, or the merchandise consigned, alter the rights of the owner in this respect, so as to entitle him to a right of lien on breach of the covenants contained therein. The lien at Common Law exists only in respect of freight actually earned by the arrival of the goods at the stipulated place of destination. Covenants, therefore, for demurrage, or for providing a full cargo, cannot be enforced by the specific remedy of lien, though the charter-party contain such penal clause. The remedy for such matters rests entirely in covenant, and the mere penal clause will not

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[1] Philip *v.* Rodie, 15 East, R. 547, and cited in Abbott on Shipp. 286, and Cross on Lien, &c. 307.

[2] Burgess *v.* Gun, 3 H. & Johns. (Md.) R. 225.

extend the right of lien. If it be the intention to create such right, it must be by express provision, that the ship-owners shall have a right to detain the goods which shall be brought home, until all their demands under the covenants are satisfied ; inasmuch as a lien may be extended, or wholly excluded by particular contract.[1]

§ 384. Lien attaches whether payment of freight is to precede or be concomitant with delivery of the cargo. By stipulations in bills of lading, that the goods shall be delivered to the consignees, they paying the freight, the delivery of the cargo and the payment of freight are concomitant acts, which neither party is obliged to perform, without the other being ready to perform the correlative act. Where the owner of the vessel covenanted to deliver the cargo agreeably to bills of lading, and the freighters covenanted to pay one third of the freight in cash *on arrival*, and the remainder

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[1] In the case of Birley *v.* Gladstone an entire ship was chartered for a voyage out and home, and by the terms of the charter-party, the merchant covenanted to pay for the homeward cargo at certain rates per ton, on delivery of the cargo at Liverpool, by bills at three months ; to load a full cargo and to pay demurrage, and he bound the goods to the performance of his covenants. The Court of King's Bench decided, that the owner could not detain the goods, either for the freight of such as were put on board but afterwards relanded by compulsion, or for dead freight, or for demurrage. A bill was afterwards filed in Chancery for the purpose of obtaining a declaration, that the ship-owners were entitled to a lien in equity ; but the Master of the Rolls, Sir William Grant, dismissed the bill ; and in the course of his judgment, he said : "There can be but one right construction of the clause, and if it could be said that the Court of King's Bench had ill construed it, this is not a Court of appeal in which their decision can be corrected. It was asked, what effect the clause could have, if it gave no lien either in law or equity ? A Court of Equity is not bound to find an equitable effect for a clause, merely because the construction which a Court of law has put upon it, would leave it inoperative. In truth, it has been copied from foreign charter-parties, with very little consideration with the effect that might be allowed to it in the law of this country." Birley *v.* Gladstone, 3 M. & Sel. R. 205, and 2 Mer. Ch. R. 401. And see Cross on Lien, &c. 307, and Abbott on Shipp. 286.

on delivery of the cargo, by good bills of exchange, at four months date; and the captain landed the goods in his own name, and offered them the freighter at one delivery, on receiving the stipulated freight; it was held, that the owner had a lien on them until such bills were produced by the freighter.[1]

§ 385. Notwithstanding, therefore, the opinion which seems to have been formerly entertained,[2] that wherever there was a *special contract* between the parties, no lien could exist, the doctrine does not now prevail.[3] It was examined with great care by the Court (as it involved the consideration of several ancient authorities) in the case of Chase *v.* Westmore,[4] and in the judgment delivered, after advisement, by Lord Ellenborough, was repudiated, and expressly declared to be contrary to reason and the established principles of law. In Pinney *v.* Wells, in Connecticut,[5] the Court declare, that the rule may now be considered as settled, that a lien may exist, although there is a special contract.

§ 386. The existence, therefore, of a special contract between a common carrier and his employer, regarding the services to be performed, and the compensation to be paid, does not deprive the former of his lien, *unless there is something in that contract inconsistent with such lien.* In other words, no claim to the possession of goods can be set up

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[1] Yates *v.* Mennell, 2 Moore, R. 297; and see Tate *v.* Meek, Ib. 278; Yates *v.* Railton, 8 Taunt. R. 293; and Abbott on Shipp. 293, 294.

[2] See opinion of Williams, J., in Pinney *v.* Wells, 10 Conn. R. 104, and opinion of Lord Ellenborough in Chase *v.* Westmore, 5 M. & Selw. R. 180.

[3] Ibid., and note to Metcalf's Edit. of Yelv. R. 67 *a*.

[4] Chase *v.* Westmore, *ub. sup.*

[5] Pinney *v.* Wells, *ub. sup.* By the old authorities, says Kent, no lien existed in cases of special contract for the price, but those authorities have been overruled as contrary to reason and the principles of law; and it is now settled, that it exists equally, whether there be, or be not, an agreement for the price. 2 Kent, Comm. 634.

which conflicts with the terms of the contract. Credit given, by the contract, to the employer for the price of transportation, beyond the time when the goods transported are to be delivered and placed out of the carrier's control, is inconsistent with a lien.[1] Lord Ellenborough declared a lien to be wholly inconsistent with a dealing on credit, and maintained, that it could only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed.[2]

§ 387. In Chandler *v.* Belden, in New York,[3] the defendant agreed to transport salt from Turks Island to New York, and by the terms of the contract five hundred dollars were to be paid in advance, and the balance in three equal payments at thirty, sixty, and ninety days after its arrival in New York. The five hundred dollars having been paid, the defendant claimed a lien for the balance of the freight. But the Court denied that a lien existed, and held, that it could not be enforced, where the parties had expressly regulated the time and manner of paying freight, by stipulation in a charter-party; especially, if the cargo is to be delivered before the period of payment arrives; Spencer, J., saying, that such an agreement was an express renunciation of the right to insist on freight before the cargo was delivered.

§ 388. In Pinney *v.* Wells, before referred to,[4] A., a man-

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[1] Ibid.

[2] Raitt *v.* Mitchell, 4 Campb. R. 149. Where a solicitor took the notes of an executor of his employer, payable in three years, it was held, that, by necessary implication, he agreed to give up the papers and rely upon the security; and the Lord Chancellor said, that if a lien commenced under an implied contract, and afterwards a special contract was made for payment, in the nature of the thing one contract destroys the other. Cowell *v.* Simpson, 16 Ves. R. 275. The same principle is recognized in Crawshay *v.* Homfray, 4 B. & Ald. R. 50.

[3] Chandler *v.* Belden, 18 Johns. (N. Y.) R. 157.

[4] Pinney *v.* Wells, 10 Conn. R. 104.

ufacturer, and B., a common carrier, entered into a contract, in May, 1833, wherein it was stipulated, that B. should transport 1500 tons of coal belonging to A. from Philadelphia, and deliver it at Collinsville, in Connecticut; that A. should pay B. for this transportation $4 and 37½ cents per ton; that A. should have the privilege of giving his notes payable at the Hartford Bank, instead of paying the cash; that all the notes so given previous to the 1st of August, 1833, to be payable in four months, and all given after that time, to be payable in three months from the dates thereof. Whereupon B. immediately commenced the transportation of the coal under the contract, and before the 10th of September, 1833, had transported from Philadelphia to New Haven 1276 tons, of which he had transported 753 tons from New Haven to Avon, and 623 tons from Avon to Collinsville, when A. failed, and made a general assignment of his property, including the coal at New Haven and Avon, in a course of transportation, in the possession of B.; A. at different times, between the 28th of June, 1833, gave B. his notes pursuant to the contract, to the amount of $3,450, which were outstanding at the time of A.'s failure, and remained unpaid. It was held, that this was substantially a contract upon which B. gave A. credit, and thereby B. waived the benefit of a lien on the coal in his possession, either for the transportation of the whole, or the parcels not delivered. It seemed to Williams, J., (in whose opinion all the Judges present concurred) apparent, under the circumstances of the case, that the contract in question was utterly inconsistent with a lien in the carrier; and he remarked, that "if by the contract originally made, they (the carriers) waived any claim for freight, and instead of leaving their payment to the implication of law, they contracted to give a credit for the freight, then whether they had parted with the possession or retained it, they must look only to the contract they had entered into, for their security."

§ 389. It may distinctly appear, by the terms of a charter-

party, that the owner of the ship has been content to trust to the personal responsibility of the merchant, and by fixing a specific time of payment, before or after delivery, to waive his right of lien.[1]

§ 390. The principle above considered has likewise been extended to cases where there was no express agreement to give credit, but where, by the *usage of trade*, a credit might be claimed; as where a ship was taken to a dock to repair, and great expenses were incurred by the shipwright; it being proved, that, by usage, the owner of the ship might demand a credit, it was held there was no lien.[2] And again, where goods were landed upon a wharf in October, and by usage, wharfage was not payable until Christmas, it was held there could be no lien.[3]

§ 391. *Secondly*, as to the right of the carrier to the recovery of his hire *after the possession of the goods has been relinquished.* He is compelled, in such event, to resort to an action at law to recover compensation for his service; and the compensation, when thus claimed by a carrier by water, has obtained the appellation of FREIGHT.[4] This term, in its most extensive sense, is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers;[5] but, in the common acceptation of the term, it means the price for the actual transportation of goods by sea from one place to another.[6] Foreign writers consider

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[1] Lucas *v.* Nockells, 4 Bing. R. 729.

[2] Raitt *v.* Mitchell, 4 Campb. R. 146.

[3] Crawshay *v.* Homfray, 4 B. & Ald. R. 50.

[4] Beawes, Lex Merc. 118; Abbott on Shipp. 405; 3 Kent, Comm. 219. Freight, in the general legal sense of the term, means all rewards, hire, or compensation, paid for the use of ships. Pothier, Traite de Charter-partie, n. 1. See note 1 to Abbott, *supra*.

[5] Giles *v.* The Cynthia, 1 Peters, (Adm.) R. 206.

[6] 3 Kent, Comm. 218, and Pothier, *supra*.

passage money the same as freight; and as Lord Ellenborough has affirmed, except for the purposes of *lien*, it seems the same thing.[1]

§ 392. The amount of freight is most usually fixed by agreement between the parties; but when there is no agreement for the price of conveyance, the carrier may recover his reward on a *quantum meruit;*[2] the amount to be ascer-

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[1] Mulloy *v.* Backer, 5 East, R. 321. Upon this resemblance the following case arose: — The plaintiff agreed to convey the defendant, his family and luggage from Demarara to Flushing. In the course of the voyage, his vessel was taken by an English brig and brought into Plymouth. The defendant and his family were set at liberty, and their luggage restored. And the action was brought to recover the passage money for so much of the journey as was performed at the time of the interruption; upon the principle, that the defendant had accepted his own liberation, and his luggage, at Plymouth, and did not require the plaintiff to carry him on to the end of his journey, which, it was contended, was a sufficient foundation for a promise to be implied. The vessel and cargo had been libelled in the Court of Admiralty for condemnation, but no decision as to the vessel, which was claimed by a British subject as his property, had taken place at the commencement of the suit. Upon which fact, the case was ultimately decided. The action which presumed the freight *pro rata* to be in the plaintiff, was held to have heen prematurely brought, "pending the discussion of these rights in a Court which has not only competent, but exclusive, jurisdiction over the question of prize, and which has power to deal with the freight as it thinks proper. Pending the suit in the Admiralty, no person had a right to restore the passenger's luggage, which in strictness was as much subject to the question of prize as the ship and cargo; and the mere restoration of it, *de facto*, by an unauthorized hand, cannot affect the right of the captors pending the suit." Mulloy *v.* Backer, *ub. sup.* In this case, the action was brought pending the proceedings in the Court of Admiralty, and upon that ground, was decided against the master, because possibly the Court of Admiralty might order the defendant to pay to the captors. That passage money and freight are governed by the same rules as between the passenger or freighter, and the shipowner and master, see Moffat *v.* East India Co. 10 East, R. 468; Watson *v.* Duykinck, 3 Johns. R. 335; Howland *v.* The Lavinia, 1 Peters, (Adm.) R. 126; Griggs *v.* Austin, 3 Pick. (Mass.) R. 20.

[2] Bastard *v.* Bastard, 2 Show. R. 81; and see on this subject more fully, *ante*, § 124.

tained by the usage of trade, and the circumstances and reason of the case.[1] But, in respect to the usage, when relied on, and sought to be established, it must be shown to be a generally recognized usage, and must not merely exist in the judgment and opinion of witnesses.[2] In a case where two witnesses stated, that the usual practice of the trade to Sydney, was to consider steerage passengers as "cargo," and their passage money as "freight;" but could give no instances of such construction, within their own knowledge; it was held, that the evidence was insufficient to establish an usage of trade, so as to vary the *primâ facie* meaning of the words "cargo" and "freight" in a written contract.[3]

§ 393. Of course, to entitle a common carrier to recover for freight, it must appear that the property was not transported against the express orders of the owner; nor will a receipt of the property by the owner alter the case.[4] If there be an earnest given, and a *verbal* agreement only for freight, and the same be broken off by the merchant, according to the Rhodian Law he loses his earnest; but if the owners or master repent, they forfeit double.[5] But by the Common Law, the party damnified may bring his action on the case and recover all damages on the agreement. A. contracted with B. for the carriage of 100 quarters of barley and promised to deliver unto him the said 100 quarters at Barton Haven, to carry them for him, and for the carriage thereof did promise to pay him so much; and B. promised to carry the same for him, and accordingly brought his ship to the said haven, expecting there the delivery of the 100

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[1] 3 Kent, Comm. 219. If goods be sent on board a vessel generally, the freight must be according to that commonly paid for the like accustomed voyages. Beawes, Lex Merc. 190.

[2] *Ante*, § 358.

[3] Lewis *v.* Marshall, 13 Law Journ. (N. S.) cited in Addis. on Contr. 166.

[4] Schureman *v.* Withers, Anthon, (N. Y.) N. P. C. 166.

[5] Beawes, Lex Merc. 190, cited in Jones on Carr. 138.

quarters of barley; but A. came not to deliver the same to him. Whereupon B. brought his action of assumpsit for the freight, and upon the general issue pleaded, had a verdict and judgment, which was affirmed upon a writ of error.[1] If goods are put on board a vessel in pursuance of an agreement to execute a charter-party, and while on board they are sold, and the purchaser refuses to pay the freight, the proper remedy by the owner of the vessel for the injury sustained by him, in consequence of the violation of the contract, is by an action. No freight being due on the cargo before the commencement of the voyage, there exists no right of lien.[2]

§ 394. With respect to *living animals*, whether men or cattle, which may die during the voyage, without any fault or neglect of the persons on board the ship, if there be no express agreement whether the freight is to be paid for the lading or for the transporting of them, freight is to be paid as well for the dead as the living. If the agreement be to pay freight for the *lading* them, their death cannot deprive the owners of the freight. If the agreement be to pay freight for *transporting* them, then no freight is due for those that die on the voyage, because, as to them, the contract is not performed. These distinctions are found in the Civil Law, and are adopted by all the writers on this subject.[3] They have been laid down by Beawes, as being acknowledged positions in maritime law,[4] of which Lord Mansfield has said,[5] that it is the general law of nations, *Non erit alia lex Romæ, alia Athenis; alia nunc, alia post*

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[1] Atkinson *v.* Buckle, 3 Bulstr. R. 152, and cited in Jones on Carr. 139.

[2] Burgess *v.* Gun, 3 Harr. & Johns. (Md.) R. 225.

[3] Abbott on Shipp. 409, 410, who cites Dig. 14, 2, 10; Roccus, not. 76, 77, 78; Molloy, B. 2, ch. 4. And so laid down in 3 Kent, Comm. 225, 226.

[4] Beawes, Lex Merc.

[5] 2 Burr. R. 887.

hac; sed apud omnes gentes, et omni tempore una eademque lex obtinebit.[1]

§ 395. Freight may be due in respect of *charter-party*. These instruments, as has already been shown, (although they sometimes contain an actual demise of the ship from the owners to the freighters,) are often so framed, that the legal possession of the ship shall remain in the owner, and a mere right of lading the vessel shall be acquired by the freighter. A charter-party of this kind differs from a bill of lading, only in extending to all the goods on board; and a ship so chartered only in this, that the owner contracts to carry only for *one* person, instead of *several;* and in such case the owner is to be considered as the carrier of the goods, and is subject to the liabilities attaching on persons using that trade.[2]

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[1] And see also Jones on Carr. 139. Live animals and the freight of them are not protected by a policy of insurance in general terms upon "cargo" and "freight," but are the subjects of a particular insurance. Wolcott *v.* Eagle Insurance Company, 4 Pick. (Mass.) R. 429. It should seem reasonable, that parties, in insurance upon living animals, should make a particular agreement as to the extent of the risk to be borne. For it is not to be supposed, that the premium for insuring a cargo of race-horses, elephants, or or other valuable animals, would not be greater than for insuring bales of goods. In the former case, the animals would be exposed not only to natural death, but to destruction by the breaking of their limbs from the rolling of the ship; which would not occasion the least injury to the bales of merchandise. And the freight upon animals is estimated, sometimes upon the number laden on board, and sometimes upon the number delivered alive, but not upon such as die upon the passage; unless there should be a particular agreement. Per Putnam, J., in delivering the opinion of the Court in Wolcott, &c. *supra.* In an action on a charter-party, £14 was to be paid in England for each passenger *ordered on board* the ship, and not for each passenger who should be *brought* to England; and it was meant to be a compensation for providing diet and accommodation for the passengers, which expense would, at all events, be incurred whether the ship arrived or was lost. Per Le Blanc, J., in Moffat *v.* East India Company, 10 East, R. 468.

[2] Jones on Carr. 120; 4 Com. Dig. 231, and tit. Merchant, E. 8; 2 B. & Ald. R. 507; 2 B. & Bing. R. 427; Beawes, Lex Merc., and see *ante*, § 88, 89.

§ 396. The right of recovery of freight, according to the contract for that purpose in the charter-party, of course depends upon the terms in which the contract is expressed. These are so numerous and so varied in proportion to the different degrees of confidence mutually reposed in each other by the parties thereto, that the many decisions which are to be found in the books arising upon contracts for freight, constitute a large portion of the law of shipping.[1] To point them all out would far extend the limits, and exceed the design, of the present work. The general rule which Courts have adopted with regard to the construction of charter-parties, as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and the particular trade to which the contract relates.[2]

§ 397. It is often provided in charter-parties, that the goods shall be delivered agreeably to bills of lading to be signed by the master; and the master, upon receiving the goods, signs bills of lading for delivery on payment of freight, or with words of similar import, giving him a right to refuse to make delivery to the person designated by the bill of lading, without payment of freight. And, as it has sometimes happened, that the master has not insisted upon the exercise of this right, it has been much questioned whether the merchant-charterer was answerable for the freight; and it has been decided that he is answerable.[3]

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[1] See Abbott on Shipp. Part 4, ch. 1, entitled "Contract of Affreightment by Charter-party;" Ibid. Part 4, ch. 9, entitled "Of Payment of Freight;" 3 Kent, Comm. Lect. 47. A person who charters a vessel does not become owner for the trip, when, by the terms of the charter-party he pays a gross sum, — the general owner furnishing the master and crew, and defraying the expenses of the vessel. Schooner Argyle *v.* Worthington, 17 Ohio R. 460.

[2] Abbott on Shipp. 250.

[3] Abbott on Ship. 414, *et seq.*; and see 3 Kent, Comm. 222; Spencer *v.* White, 1 Ired. (N. C.) R. 226; Laying *v.* Stewart, 1 Watts & S. (Penn.) R. 222; Barker *v.* Havens, 17 Johns. (N. Y.) R. 234.

A., a common carrier, received goods at Philadelphia for C. & T. at Lexington, and receipted for the same, to be delivered to H. & L. of Pittsburgh, "on presenting this receipt and payment of freight." The goods were delivered, but the freight was not paid, and H. & L. received the amount of the freight from C. & T., and afterwards failed. It was held, that A. was entitled to recover the amount of the freight from C. & T.[1] The Court in this case considered the point before them had long been settled. It was fully discussed in Shepard *v.* De Bernales,[2] and ruled, upon the authority of Penrose *v.* Wilkes,[3] Tapley *v.* Martin,[4] and Christy *v.* Rowe,[5] that the stipulation in a bill of lading, for delivery on payment of freight, is introduced for the benefit of the consignor, or the party for whom the consignee is agent. If the agent should be faithless, the loss would fall on those who trusted him, and they ought to bear it, and this is a point conclusively established.[6]

§ 398. A *bill of lading* is called by Lord Loughborough[7] the written evidence of a contract for the carriage and delivery of goods sent by sea, for a certain freight. Its peculiarity is, that unless freight is wholly earned, by a strict performance of the voyage, no freight is due or recoverable. The contract of the ship-carrier is indivisible, and he can recover for no portion of the voyage that has been made, until the whole is finished, and the goods have reached their destination; unless the consignees, by *a new contract*, accept them short of the place of destination. The contract for the conveyance of merchandise, by a bill of lading, is, says Lord Tenterden, "an entire contract, and unless it be completely

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[1] Collins *et al. v.* Union Trans. Co., 10 Watts, (Penn.) R. 384.
[2] Shepard *v.* De Bernales, 13 East, R. 567.
[3] Penrose *v.* Wilkes, Abbott on Shipp. 415.
[4] Tapley *v.* Martin, 8 T. R. 445.
[5] Christy *v.* Rowe, 1 Taunt. R. 300.
[6] Collins *et al.*, *ub. sup.*
[7] 1 H. Bl. R. 350, and see *ante*, § 223.

performed, by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labor expended in a partial conveyance, and consequently be subject to no payment whatever; although the ship may have been hired by the month or week."[1] The doctrine has never been controverted, and is expressly asserted by Mr. Justice Story in the case of the ship Hooper.[2]

§ 399. As freight is the payment made for the conveyance of merchandise to its destination, it denotes the price of *carriage* and not of receiving goods *to be carried;* and hence, though a merchant may contract to pay a sum of money to a ship-owner for taking goods on board, yet such payment is not, strictly speaking, *freight.* It is thus, that no freight becomes due until the voyage is completely performed; and in consequence of this rule, when a ship has been engaged to sail from one port to another, as from A. to B. and back again, it may become important to know whether this employment is to be looked upon as consisting of one or two distinct voyages. The question is one, in the solving of which Courts are guided by the intention of the parties as collected from the words and subject-matter of their agreement.[3]

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[1] Abbott on Shipp. 491. The same doctrine is laid down by Holt, Law of Shipp. 134; 3 Kent, Comm. 219.

[2] The Ship Nathaniel Hooper, 3 Sumn. (Cir. Co.) R. 542. And see also Jordan *v.* Warren Insurance Company, 1 Story, (Cir. Co.) R. 352; Saltus *v.* Ocean Insurance Company, 14 Johns. (N. Y.) R. 138; Griswold *v.* New York Insurance Company, 3 Ib. 321; Caze *v.* Baltimore Insurance Company, 7 Cranch, (U. S.) 358.

[3] Smith, Merc. Law, 299; Blakely *v.* Dickson, 2 B. & Pull. R. 321; Andrew *v.* Moorehouse, 5 Taunt. R. 435; Mashiter *v.* Bullar, 1 Campb. R. 84; Crozier *v.* Smith, 1 M. & Gran. R. 407; Abbott on Shipp. P. 3, ch. 7, s. 17; Brown *v.* Hunt, 11 Mass. R. 45; Lock *v.* Swan, 13 Mass. R. 76; Coffin *v.* Storer, 5 Mass. R. 252; Banker *v.* Cheviot, 2 Johns. (N. Y.) R. 332; Penoyer *v.* Hallet, 15 Johns. (N. Y.) R. 332; Blanchard *v.* Buckman, 3 Greenl. (Me.) R. 1.

§ 400. To perfect the right to freight it is not only necessary, that the goods arrive at the place of destination, but there must be a delivery of them.[1] But although no action will lie for the amount of freight until delivery, the master (as has appeared) may retain the goods until the freight is paid. In all cases, however, where a delivery is prevented by the neglect or default of the owner of the goods, the freight becomes payable;[2] and it has been decided in Pennsylvania, that if the goods are tendered to the consignee, but the landing of them is prevented by the refusal of the government to allow it to be done, the whole freight is earned.[3]

§ 401. If the ship be captured, the owners of it, of course, lose their freight, as well as the merchant his goods. But in case of re-capture and subsequent performance of the voyage at the place of destination, the right to freight revives, and becomes due on the completion of the voyage.[4] The same rule extends to a resumption of an interrupted voyage after the removal of an embargo by which it was so suspended.[5]

§ 402. If the vessel, having performed part of her voyage, be disabled from completing the remainder, then transshipment to the place of destination is in furtherance of the

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[1] Lane *v.* Penniman, 4 Mass. R. 91; Certain Logs of Mahogany, 2 Sumn. (Cir. Co.) R. 589.

[2] Bradstreet *v.* Baldwin, 11 Mass. R. 229; Palmer *v.* Lorillard, 16 Johns. (N. Y.) R. 346, cited in note to Abbott on Shipp. (5th Am. edit.) 406.

[3] Morgan *v.* North American Insurance Company, 4 Dallas, (Penn.) R. 455.

[4] Beale *v.* Thompson, 3 Bos. & Pull. R. 420, 431; The Race Horse, 3 Rob. R. 101.

[5] Ibid. and Curling *v.* Long, 1 Bos. & Pull. R. 637; and 2 Holt on Shipp. 135.

original purpose.[1] In case of such transshipment, it was at one time a question, whether the remainder of the voyage, after the transshipment, was to be considered as performed under the old contract or under a new one, and whether the remuneration was to be at the rate of freight originally contracted for, or on a *quantum meruit*. It is said, however,[2] to be well settled in England, that if the goods be conveyed safely to the place of destination, the freight shall be that originally contracted for. This was so decided in Shipton *v.* Thornton,[3] in which the Court say: "It may be taken to be either the *duty* or the *right* of the owner to transship. If it be the former, it must be so in virtue of his original contract; and it should seem to result from a performance by him of that contract, that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending the fulfilment. If it be the latter, a right to the full freight seems to be implied. The master is at liberty to transship, but for what purpose, except for that of earning his full freight at the rate agreed on?"

§ 403. In the above case of Shipton *v.* Thornton, the question was incidentally mooted: — *If the transshipment can only be effected at a higher than the original rate of freight, which party is to stand to the loss?* The opinion of the Court appeared to be, that, in such case, the master's *right* to transship would be at an end, but that he would become the freighter's agent to do what was most for his benefit under the circumstances, and that, consequently, if it were for the freighter's advantage that the goods should be forwarded, and an increased rate of freight incurred, the freighter would be bound by his agreement to pay such increased rate. No

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[1] See *ante*, § 187. As to privilege of re-shipping under bill of lading, see *ante*, § 227.

[2] Smith, Merc. Law, 305.

[3] Shipton *v.* Thornton, 9 Adol. & Ell. R. 314.

authority directly on the point was cited from books of the Common Law. It was treated very much as a new point to be decided on principle; and the foreign authorities upon the subject of transshipment were elaborately reviewed by Lord Denman. Mumford *v.* Commercial Insurance Company[1] presented the same question. The facts were, that goods were captured during the voyage, and the vessel was released, but the goods detained for further proof, and were afterwards restored on payment of the full freight; but the owner was obliged to hire another vessel to carry the goods to the place of their destination; it was held, that the insurer was liable to pay this additional or increased freight, being an expense necessarily incurred in consequence of the capture. Kent, C. J., who delivered the opinion of the Court, said, that the point in question was not anywhere adjudged in the English books, but he considered that in a case in which no English decisions are to be met with, it was usual and proper to listen with attention and respect to foreign jurists.[2]

§ 404. What is called "apportionment of freight," usually happens when the vessel, by reason of any disaster, goes into a port short of the place of destination, and is unable to complete the voyage. In this case, as we have already seen, the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight; but if he is unable or declines to do this, and the goods are there received by the merchant, he shall be paid according to the voyage performed.[3] The exception to the general rule, that the contract by the bill of lading is indivisible, and that, therefore, the ship-carrier can recover for no portion of the voyage which has been performed, unless the whole be

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[1] Mumford *v.* Commercial Ins. Co. 5 Johns. (N. Y.) R. 262.

[2] The learned Judge cited Pothier, Trait. d'Ass. n. 52; Marsh. on Ins. 172; and see Scheiffelin, 9 Johns. (N. Y.) R. 21; Searle *v.* Scovil, 4 Johns. (N. Y.) Ch. R. 218.

[3] Abbott on Shipp. 434.

performed, has already been incidentally stated to be, a *new contract* by the merchant to accept the cargo short of the place of the original destination. If the merchant-freighter himself, or his agent or consignee, are willing to dispense with the performance of the whole voyage, and voluntarily accept the goods before the complete service originally intended is rendered, the law is, and has long been, that a proportionate amount of freight will be due; or as it is termed, "freight *pro rata itineris peracti*."[1] This equitable rule of maritime law is, without doubt, extremely ancient, it being found, as Lord Mansfield says, in Luke *v.* Lyde,[2] in the marine laws of Rhodes. The Marine Law having decided, that in certain cases, freight shall be paid *pro rata*, the Common Law presumes in those cases a promise to that effect, as being made by the party who consents to accept his goods at a place short of the port of destination; for he obtains his property, with the advantage of the carriage thus far; and as he cannot be sued for freight on the original contract, as that has not been performed, (for the purpose of justice and in furtherance of the Marine Law,) a promise of partial payment, is, by the Common Law implied from the fact of the acceptance of the cargo.[3]

§ 405. Upon a review of all the English cases upon the subject, it will appear, that considering the subject with regard to the proceedings in the Courts of Common Law the right to freight *pro rata itineris* must arise out of some *new contract* between the master and the merchant, either expressly made by them, or to be inferred from their conduct.[4]

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1 Abbott on Shipp. 434.

2 Luke *v.* Lyde, 2 Burr. R. 889.

3 Jones on Carr. 144. Attention has already been called in another Chapter to cases, wherein an acceptance of the goods short of the place of destination, not only excuses a non-delivery by the carrier to the place originally intended, but renders the owner or consignee liable for the payment of a *pro rata* freight. See *ante*, § 332.

4 Abbott on Shipp. 448.

The contract was inferred from the fact of the acceptance of the goods, in Luke *v.* Lyde.[1] Lord Mansfield, in that case, manifestly presumed an implied contract from the circumstance that Lyde took the cargo saved into his own possession, and sending it to a different port from that of its original destination, without any demand on the master to send it forward by another ship. The same principle, namely, that the master cannot recover upon the original contract, which he has not performed, but must sue, if at all, upon some new contract, implied or expressed, will be found to pervade all the cases. The contract is expressed where the merchant directly waives the prosecution of the voyage; and it is implied where he accepts the goods, as if he took them *as a part of the beneficial service performed, though not the whole.* The latter limitation is important, because, if he accepts them only from the necessity of the case, he, under such circumstances, will only take up his own goods; and the Court will not be able to imply, that, by such an acceptance, he had any intention to waive the completion of the whole agreement.[2]

§ 406. Such, it may be confidently stated, is, on the whole, the established doctrine in the United States. All the cases,

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[1] Luke *v.* Lyde, 2 Burr. 888.

[2] 2 Holt on Shipp. 150. In Cooke *v.* Jennings, 7 T. R. 381, Mr. J. Lawrence thus expresses himself: — "When a ship is driven on shore, it is the duty of the master either to repair the ship, or to procure another; and having performed the voyage, he is then entitled to his freight; but he is not entitled to his whole freight unless he performs the whole voyage, except in cases where the owner of the goods prevents him; nor *is he entitled pro rata, unless under a new agreement.* Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the *original* agreement under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action." These principles were affirmed by Lord Ellenborough in Hunter *v.* Prinsep, 10 East, R. 378.

says Mr. Justice Story, "in which the full freight is, on the ordinary principles of commercial law, due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement, that the non-arrival has been occasioned by no default or inability of the carrier-ship, but has been occasioned by the default or *waiver* of the merchant-shipper. In the former case, says he, the merchant-shipper cannot avail himself of his own default to escape payment of freight; in the latter, he dispenses with the entire fulfilment of the original contract, for his own interest and purposes."[1]

§ 407. There may be some authorities which hold, that a *compulsive* receipt of goods by the owner would render a *pro rata* freight due. But in such case, says Mr. J. Story, "I conceive it now to be well settled, that no freight is due," and the learned Judge asserts emphatically, that there is no principle which would justify a *pro rata* freight, when there has been no *voluntary* acceptance at an intermediate port, dispensing with the further carriage of them, but only an involuntary sale from necessity, to prevent them from there perishing by a total loss.[2] In the case of Welsh *v.* Hicks, in New York,[3] it is said for the Court, by Sutherland, J., that "freight *pro rata itineris* is due where a ship, in consequence of perils of the sea, without any fault of the master, goes into a port short of her destination, and is unable to prosecute the voyage; and the goods are received by the owner at an intermediate port." On the other hand, the learned Judge concedes, that where the master refuses to repair his ship, or to procure other vessels for the purpose, and the owner of the goods then receives them, that is not such an acceptance of the goods as will entitle the ship-owner to a *pro rata* freight. In such case, the owner does

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[1] The Nathaniel Hooper, 3 Sumn. (Cir. Co.) R. 542.

[2] Ibid., and the numerous authorities there cited.

[3] Welsh *v.* Hicks, 6 Cow. (N. Y.) R. 510.

not *elect* to receive his goods at the intermediate port, and sell them there, or become his own carrier to the port of destination. He does not assent to the termination of the voyage; but it having been terminated, against his will, by the refusal of the master to send on his goods to the port of destination, he does not, by receiving them, under such circumstances, promise to pay the freight to the intermediate port.[1]

§ 408. Upon the question, as to the right of the merchant to abandon his goods, when brought to the place of destination, and by so doing, *discharge himself from freight*, different doctrines and opinions, it is said, have prevailed, and there is in England no judicial decision; although in some cases, between the merchant and the insurer, it has been admitted, that the freight was payable, notwithstanding the

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[1] Mr. Justice Story, in a note to the 5th Am. edit. of Abbott on Shipp., commencing on p. 547, thinks that the above case of Welsh *v.* Hicks is entitled to much consideration, as it shows, that the mere acceptance of the goods, unless it is a matter of choice, does not *per se* give a title to freight *pro rata*. He also furnishes, in the same note, a summary statement of the American decisions, because they do not, in all respects, perfectly concur. The case of Luke *v.* Lyde seems at first to have been understood to justify the claim of *pro rata* freight, whether there was a voluntary or a compulsive acceptance of the goods at an intermediate port, by the owner or his agent; for Baillie *v.* Mondigliani, Park on Ins. 61, pressed the doctrine so far as to apply it to cases where the proceeds were received after a compulsive sale by a prize Court. In Caze *v.* Baltimore Insurance Company, *ub. sup.*, the Supreme Court of the United States are of opinion, that the current of more recent authority points the other way. The weight of authority in this country, as appears by the note referred to, undoubtedly is, as was held in the case of the Marine Insurance Company *v.* United States Insurance Company, 9 Johns. (N. Y.) R. 186, viz. that to give a title to freight *pro rata itineris*, there must be an unequivocal, voluntary, and unconditional acceptance by the owner at an intermediate port, so as to form the basis of a new contract to pay a ratable freight; and that the acceptance of the net proceeds of the property, after a capture and sale by a prize Court, and restitution decreed, constituted no sufficient title for such freight.

goods were so much damaged, that their value fell short of its amount.[1] In Miles *v.* Bainbridge,[2] Lord Ellenborough, C. J., intimated, that if the merchant had refused to receive the cargo on the ground of damages occasioned by *default of the master*, the point would admit of some doubt. In such case, as the merchant would clearly derive no benefit whatever from the conveyance, nor the master have fulfilled his engagement, according to the terms of the bill of lading, it may very properly be inquired, what reason is there why the master should oblige the merchant to pay the freight?[3] In Bartram *v.* M'Kee, in Pennsylvania,[4] the point was taken for granted in the Common Pleas and in the Supreme Courts, that if a person carry by land or by sea, and he has not faithfully performed his part, he cannot recover full compensation; and a deduction from the price of freight was made in that case on account of damage to the goods.

§ 409. In Leach *v.* Baldwin, in Pennsylvania,[5] in an action by a common carrier to recover the price of transportation, it was held, that the defendant might set up as a defence, negligence or want of skill in the carrier, in consequence of which the goods were deteriorated in value; and that any facts which were proved, tending to show, that the plaintiff did not perform his part of the contract, or, from negligence and want of skill, performed it in such a manner that the defendant suffered loss, the latter might have the amount of such loss, as ascertained by the jury, deducted from the amount of the plaintiff's claim.

§ 410. The plaintiff, who was the owner of a canal boat,

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[1] Abbott on Shipp. 427.

[2] Miles *et al. v.* Bainbridge *et al.*, Guildhall, Dec. 20, 1804, before Lord Ellenborough, C. J., cited in note to Abbott on Shipp. 248.

[3] See Basten *v.* Butler, 7 East, R. 479.

[4] Bartram *v.* M'Kee, 1 Watts, (Penn.) R. 39.

[5] Leech *v.* Baldwin, 5 Watts, (Penn.) R. 446. See Humphrey *v.* Reed, 6 Whart. (Penn.) R. 435.

received and gave a receipt for certain casks of nails, in good order, &c., which he agreed to deliver (the dangers of the navigation excepted) in the like good order and condition to W. L., Philadelphia, he paying freight for the same at a certain rate. On the voyage to Philadelphia, the boat struck against a stone in the bottom of the canal, by which a hole was knocked in her bottom, and the nails became wet and damaged. On her arrival at Philadelphia, the captain of the boat delivered the nails at the wharf of the defendants, who were forwarding and commission merchants, with instructions not to deliver them until the freight was paid. The defendants, however, delivered the nails to W. L. without receiving the freight. In trover for the nails, it was held, that the defendants had a right to show, that, in consequence of the unskilfulness or negligence of the persons engaged in the management of the boat, the plaintiff was not entitled to recover the stipulated freight.[1]

§ 411. In an action brought in Illinois to recover the amount of freight agreed to be paid for the transportation and delivery of a certain quantity of merchandise from Buffalo to Chicago, evidence, that a portion of the goods agreed to be transported exceeding in value the whole amount of the freight claimed, was through the negligence and improper conduct of the plaintiff, lost and destroyed on the voyage, was held to be admissible, as well in the nature of a set-off, as, also, for the purpose of reducing the amount sought to be recovered by the plaintiff.[2] It is held likewise in South Carolina, that where the damage done to the goods by the carrier, exceeds the freight, to that extent, the carriers right to freight is defeated.[3]

§ 412. On the same principle, want of seaworthiness may

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[1] Humphreys *v.* Reed, 6 Whart. (Penn.) R. 435.
[2] Edwards *v.* Todd, 1 Scamm. (Ill.) R. 463.
[3] Edward *v.* Kerr, 2 M'Mull. (S. C.) R. 14.

be set up as a defence in an action to recover the price of carrying. In Dickinson *v.* Haslit, in Maryland,[1] which was an action by the shipper of goods against the captain and consignee of the cargo, to recover money retained for freight, it was held, that the plaintiff was at liberty to show, that the vessel was not seaworthy at the commencement of the voyage, in order to resist the defendants's claim to freight; and that, if the jury believed the vessel not to have been seaworthy and competent to perform the voyage at the time of its commencement, then the defendant was not entitled to retain any thing for freight, and that the plaintiff was entitled to recover the amount he claimed.

§ 413. It is clear, then, that if a common carrier demand compensation on a *quantum meruit*, the owner may show in bar of such demand for compensation, that the goods were damaged in the transportation, by the default of the carrier, to an amount exceeding that of a fair rate for the carriage.[2] And also, that, as the owner may show in evidence of the carrier's claim to recover freight, that the goods were by his default injured in the transportation, his right of lien is liable to be defeated in the same way.[3]

§ 414. But if the carrier has conducted himself with vigilance and fidelity in the course of the voyage, he has no concern with, nor is he answerable for the value of the goods.[4] A ship-owner performs his engagement when he carries and delivers the goods; the right to his freight then becomes absolute, and the carrier is not an insurer of the *soundness of the cargo*, as against *its own intrinsic decay;*[5] not more so than he is of the price in the market to which the cargo is

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1 Dickinson *v.* Haslit, 3 H. & Johns. (Md.) R. 345.
2 Schureman *v.* Withers, Anthon, (N. Y.) N. P. C. 468.
3 Edwards *v.* Kerr, 1 Rice, (S. C.) R. 203.
4 Leech *v.* Baldwin, 5 Watts, (Penn.) R. 446.
5 *Ante*, § 210, 211, *et seq.*

carried. It may impair the remedy which his lien afforded, but does not affect his personal demand against the shipper.[1] Such was the language of the Court in Griswold *v.* New York Insurance Company.[2] If casks contain wine, rum, or other liquids, or sugar, and the contents are washed out and wasted by the sea, so that the casks arrive empty, no freight is due for them;[3] but the ship-owner would still be entitled to his freight, if the casks were well stowed, and their contents were essentially gone by leakage, or inherent waste, or imperfection of the casks.[4] The carrier has also a right for freight and charges paid, although the goods may have suffered damage before they reached him, while in the hands of a preceding carrier.[5]

§ 414 *a.* The adoption of the principle, that the bill of lading is conclusive on the carrier, not only as to the apparent, but also as to the actual condition of the goods, would impose on him the necessity of opening, for self protection,

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[1] 3 Kent, Comm. 224.

[2] Griswold *v.* New York Ins. Co. 3 Johns. (N. Y.) R. 321, and see Saltus *v.* Ocean Ins. Co. 14 Ib. 138.

[3] See *ante*, § 212.

[4] 3 Kent, Comm. 224; Frith *v.* Barker, 2 Johns. (N. Y.) R. 327. When the goods become greatly deteriorated on the voyage, it has been a litigated question whether the consignee is bound to take the goods and pay the freight, or whether he may not abandon the goods to the master in discharge of the freight. Valin and Pothier have entertained opposite opinions upon this question. Val. Com. tome i. 670, Poth. Ch. Partie, No. 5. The former insists, that the regulation of the ordinance, holding the merchant liable for freight on deteriorated goods, without right to abandon them in discharge of the freight, is too rigorous to be compatible with equity. He says the cargo is the only proper fund and pledge for the freight, and that Cassaregis was of the same opinion. Disc. 22, n. 46; Ib. 23, n. 86, 87. Pothier, on the other hand, was against the right of the owner to abandon the deteriorated goods in discharge of the freight, and this is the better opinion. 3 Kent, Comm. 224. The opinion of Pothier was adopted in the case of Griswold *v.* New York Insurance Company, *ub. sup.*

[5] Bowman *v.* Hilton, 11 Ohio R. 303.

every box of merchandise, to examine and ascertain the condition of its contents, before he receives it. Besides, the injury that would be inflicted on the owners of freight would be a cogent argument against such a requisition. A carrier, therefore, who receipts for goods as in good condition, is not estopped to show that they were in fact damaged before they came into his possession. He may show a mistake or a fraud in opposition to the recital in the bill of lading, that the goods were in "good order and condition."[1]

§ 415. In an action by a common carrier to recover the price of transportation, the defendant cannot give evidence of a breach of contract in a different transaction in which unliquidated damages might be due to him; for matters sounding in tort arising out of a different transaction, cannot be given in evidence as a set-off, though they may be taken advantage of when they arise out of the same transaction, and go to defeat the plaintiff's action.[2]

§ 416. Freight being the reward to which a person is by law entitled for bringing goods lawfully upon a legal voyage, it is an answer to an action for freight, that the voyage in respect to which it is claimed was illegal, for *ex turpi causa non oritur actio*, or, as it is interpreted by Lord Mansfield, "justice must be drawn from pure fountains."[3] The legal presumption, however, is, that the voyage was legal, as every thing must be taken to be legal until the contrary is proved.[4]

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[1] Chitty on Contr. 481; Warden *v.* Greer, 6 Watts, (Penn.) R. 424; Gowdy *v.* Lyon, 9 Mon. (Ken.) R. 112. That a bill of lading is a mere receipt, subject to be opened by proof, see also *ante*, § 231.

[2] Gogle *v.* Jacoby, 17 S. & Rawle. (Penn.) R. 117, and cited in Leech *v.* Baldwin, *ub. sup.*

[3] See Abbott on Shipp. 426; Muller *v.* Gernon, 5 Taunt. R. 39; Blanck *v.* Solly, 8 Ib. 89.

[4] Bennett *v.* Clough, 1 B. & Ald. R. 461; Sissons *v.* Dixon, 5 B. & Cress. R. 758.

§ 417. If the captain be paid his freight on an illegal voyage, for goods which are lost or damaged he is answerable for them, in case the owner of them was not privy to the illegality;[1] and on the other hand, if a freighter, by loading prohibited or unlawful goods, occasions the ship's detention, or otherwise impede her voyage, he shall pay the freight contracted and agreed for.[2]

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[1] Hatchwell *v.* Cooke, 6 Taunt. R. 577.

[2] Jones on Carr. 153; Beawes, Lex Merc. 191.

CHAPTER X.

OF ACTIONS AGAINST CARRIERS, THE DECLARATION, PLEAS, EVIDENCE, DAMAGES, AND THE PARTIES TO SUE AND BE SUED.

1. *Action against a Common Carrier for refusing to receive Goods.*
2. *Proceedings in the Admiralty against Common Carriers for the Loss of Goods.*
3. *Actions at Common Law for the Loss of Goods by Carriers.*
4. *Action on the Case.*
5. *Declaration in Action on the Case may contain a Count in Trover.*
6. *Action of Assumpsit.*
7. *Distinctive Character of the Declaration, as to whether Case or Assumpsit.*
8. *As to the Allegations, &c. in the Declaration.*
9. *Pleading.*
10. *Evidence.*
11. *Damages.*
12. *The Parties to sue.*
13. *The Parties to be sued.*

1. *Action against a Common Carrier for refusing to receive Goods.*

§ 418. It has been already laid down, that a common carrier is bound to receive and carry all the goods offered for conveyance, and that he is liable to an action in case of refusal, provided there be offered a reasonable compensation.[1]

[1] *Ante*, § 124.

The form of action in such cases is *case*, in which it is necessary that it should be averred in the declaration, that the plaintiff was *willing* and *ready* to pay the defendant the amount which the defendant was legally entitled to receive for the receipt and carriage of them; though it is not necessary that he should aver an absolute *tender*. It was so decided in the case of Pickford *v.* Grand Junction Railway Company;[1] and it was asserted by the counsel for the plaintiffs, in this case, that no *precedent of a declaration* against a carrier for refusing to carry goods was to be found in the books. The declaration in this case stated, "That whereas the defendants, before and at the time hereinafter mentioned, to wit, on the 24th of November, 1840, were common carriers of goods and chattels for hire from Birmingham, in the county of Warwick, to Manchester, in the county of Lancaster, and from Manchester aforesaid to Birmingham aforesaid, and thereupon heretofore, to wit, on the said 24th of November, 1840, the plaintiffs caused to be tendered to the defendants, they being such common carriers as aforesaid, to wit, at a certain place in Birmingham aforesaid, being the place by them then used in the way of their said business as common carriers, for the receipt of parcels and goods to be by them carried and conveyed as such common carriers as aforesaid, a certain parcel of goods of the plaintiffs, to wit, a hamper containing divers goods then of great value, to wit, of the value of £100; and then requested the defendants to receive, and to carry and convey the same from Birmingham aforesaid to Manchester aforesaid; and the defendants then *had ample convenience*[2] for receiving and carrying and conveying the same according to the said requirement of the plaintiffs in that behalf; and the plaintiffs were then *ready and willing, and then offered to pay to the defendants, such sum of money as the defendants were legally entitled to receive* for the receipt and carriage and conveyance of the said parcel, and *all other charges* whatsoever which the defendants were

[1] Pickford *v.* Grand Junction Railway Co. 8 M. & Welsb. R. 372.
[2] See *ante*, § 125.

then authorized or in any wise entitled to make or receive for the receipt, carriage, and conveyance of the said parcel from Birmingham aforesaid to Manchester aforesaid, to wit, the sum of £2; and the defendants then had notice of the premises; yet the defendants, not regarding their duty as such common carriers as aforesaid, but contriving, and wrongfully and unjustly intending to injure the plaintiffs, though they did receive as aforesaid, and carry and convey, the goods of divers other persons on that occasion from Birmingham aforesaid to Manchester aforesaid, did not nor would, at the said time when they were so requested, or at any time afterwards, receive the said parcel, or carry or convey the same from Birmingham aforesaid to Manchester aforesaid, but wholly neglected and refused so to do, though they might and could, and ought as such carriers, to have received and carried and conveyed the same as aforesaid; whereby the plaintiffs were then forced and obliged to carry and convey the said parcel from Birmingham aforesaid to Manchester aforesaid, with great labor, cost, and inconvenience, and were put to great expense, &c., in and about the carriage and conveyance of the said parcel, &c., and were and are otherwise greatly annoyed, injured, inconvenienced, and damaged." To this declaration there was a *special demurrer*, assigning for cause, that the declaration *did not aver a tender* to the defendants of the money which they were entitled to receive for the carriage of the goods. On joinder in demurrer, the judgment of the Court was delivered by Parke, B., who said: "The Court think that this is not like the case of a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it, in which case the tender stands in the place of payment, and is in fact payment, so far as it is in the power of the party tendering to make it one, but which remains incomplete only because the party to whom the money is offered refuses to accept it. Such a tender we consider to be altogether unnecessary in the present case; the acts to be done by both parties, namely, the receipt of the goods, and the payment of a reasonable sum for their

carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier's taking charge of the goods. The case of Rawson *v.* Johnson clearly shows, that whenever a duty is cast on a party, in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay, or be ready to pay, the money, when the other is ready to undertake the duty. Here the acts to be done by the plaintiffs and defendants are altogether contemporaneous. The money is not required to be paid down by the plaintiffs, until the carrier receives the goods, which he is bound to carry. Our judgment, therefore, must be for the plaintiffs." [1]

2. *Proceedings in the Admiralty against Common Carriers for the Loss of Goods.*

§ 419. For the loss of goods delivered to a common carrier for transportation by sea, or to one, the substantial part

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[1] The case of Rawson *v.* Johnson, cited by the learned Judge, (1 East, R. 203,) was an action for the non-delivery of malt, which the defendant had undertaken to deliver on request, at a certain price, and it was held sufficient for the plaintiffs in the declaration to aver such request, and that they were ready and willing to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring any actual tender of the price; and Lord Kenyon said: "Under this averment the plaintiffs must have proved that they were prepared to tender and pay the money, if the defendant had been ready to receive it, and to have the goods delivered; but it cannot be necessary, in order to entitle them to maintain their action, that they should have gone through the useless ceremony of laying the money down, in order to take it up again. It would be repugnant to common sense to require it." A strictly legal tender, it was admitted by the counsel for the plaintiffs in the case of Pickford, &c. *supra*, was necessary, where there is a pre-existing debt, the amount of which may be ascertained with precision by the party tendering it. The words *tender* and *offer* are used in several instances, however, as meaning the same thing. See Levy *v.* Herbert, 7 Taunt. R. 314, and Waterhouse *v.* Skinner, 2 Bos. & Pul. R. 447.

of whose service is to be performed within the limits of tide water, the proceeding against him may, under the Constitution of the United States, be in the Admiralty, as well as at Common Law.[1] Thus, a libel in the Admiralty was entertained in the case of The Citizens Bank *v.* The Nantucket Steamboat Company,[2] for the non-delivery of certain packages of bank bills by the respondents, which were delivered to them to be carried from Nantucket to New Bedford. The libel was not *in rem*, but against the Steamboat Company alone, and no question was made, (and in the judgment of Mr. J. Story there was no just ground for such question,) that the cause was a case of admiralty and maritime jurisdiction in the sense of the Constitution of the United States, of which the District Court had full jurisdiction; and, therefore, it was properly to be entertained by the Circuit Court, on appeal from the District Court.

§ 420. At the December term of the Supreme Court of the United States, 1847, a decree of the Circuit Court of Rhode Island was affirmed, which was a judgment upon a libel *in personam* against a steamboat company for the loss of specie carried in their boat, and lost by fire in Long Island Sound. The question of admiralty jurisdiction in this case was very elaborately and very learnedly discussed both at the bar, and by several of the Judges. Nelson, J. considered the contract of conveyance was a *maritime contract*, and the service a *maritime service* to be performed upon waters within the ebb and flow of the tide; and that therefore, according to several cases in Admiralty which had been before the Court at former periods, it was within the jurisdiction of the Admiralty. In this opinion Mr. C. J. Taney, Mr. J. McLean, and Mr. J. Wayne (as the Reporter understands)

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[1] New Jersey Steam Navigation Company *v.* Merchants Bank, 6 How. (U. S.) R. 378; King *v.* Shepard, 3 Story, (Cir. Co.) R. 349.

[2] Citizens Bank *v.* Nantucket Steamboat Company, 1 Story, (Cir. Co.) R. 16, cited more fully *ante*, § 102, 103.

concurred. Mr. J. Catron treated the question as one not depending on *contract*, but upon a *tort;* as the fire occurred on the high seas, it was a *tort there*, and the locality of the tort is the *locus* of jurisdiction. Mr. J. Woodbury (after an elaborate review of the authorities, as to the true line of discrimination between the jurisdiction belonging to the Common Law Courts and that in Admiralty) was inclined not to rest jurisdiction in the Admiralty over a transaction like the one in question on contract alone; but he was in favor of the affirmance of the decree on the ground of a recovery for the wrong committed as a *marine tort*, rather than on any *breach of contract* which could be prosecuted in the Admiralty. But Mr. J. Daniel was wholly in favor of reversing the decree of the Circuit Court and of dismissing the libel; but all the rest of the learned Judges, it seems, were against him on the grounds above stated.[1]

§ 421. In the course of the argument in the case of The Citizens Bank *v.* The Nantucket Steamboat Company,[2] it was intimated, that in libels of this sort, the proceedings might properly be instituted both *in rem* against the steamboat, and *in personam* against the owners and masters thereof. But Mr. J. Story thereupon was induced to declare, that he knew of no principle or authority, in the general jurisprudence of Courts of Admiralty, which would justify such a joinder

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[1] New Jersey Steam Navigation Company *v.* Merchants Bank. *ub. sup.* In the case of the Huntress, Daveis, (Dist. Co.) R. 94, which in its features was like the case just cited, the question whether the Admiralty Court had jurisdiction over the cause as one arising on contract growing out of a maritime service, was not raised by counsel nor adverted to by the Court. But there is appended to the opinion of the Court holding the carrier liable, some valuable and learned observations in vindication of its taking cognizance of causes of this description; and it is stated, that the competency of the Court to pass upon such questions, had been, in the Maine District, in several cases in which the same general question was involved, maintained.

[2] *Ub. sup.*

of proceedings, so different in their nature and character, and decretal effect; but, on the contrary, every practice of this sort had been discountenanced as illegal and improper.

3. *Actions at Common Law for the loss of Goods by Carriers.*

§ 422. It appears by the two cases last cited, that common carriers by sea are liable to be proceeded against in the Admiralty for the loss of goods delivered to them for transportation, both *ex contractu* and *ex delicto*, or, in other words, for a breach of contract and for a breach of duty. But in respect to the proper form of action at Common Law against all common carriers, there was for a long time a question, and one much agitated among pleaders; and it was natural that the question should arise out of the innovation upon the Common Law duties of carriers. As long as their occupation was considered only as a public duty, the breach was *tort*, for which they were liable to an *action on the case*, founded upon the custom of the realm; or, in other words, upon the Common Law. In time, however, they succeeded in establishing the existence of a contract, and then they at once became liable to an action of *assumpsit* on their undertaking; and a very long established, continued, and uniform usage has sanctioned the principle and adopted the advantages of both forms of action; so that the case may be considered either way, as arising *ex contractu* or *ex delicto*, according as the neglect of duty, or breach of promise, is intended to be relied on as the cause of injury.[1] The practice of declar-

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[1] Jeremy on Carr. 116, 117. And see the concluding portion of the note to Coggs *v.* Bernard, in 1 Smith's Leading Cases, 96, (Am. edit., Philadelphia, 1847.) Also Boson *v.* Sandford, Salk. R. 44, and 2 Show. R. 478. Per Dennison, J., in Dale *v.* Hall, 1 Wils. R. 282: — "The declaration upon the custom of the realm, is the same in effect with the present declaration (in assumpsit.) In the old forms, it is that the defendant *suscepit*, &c., which shows that it is *ex contractu*," and this authority

ing against common carriers on the custom of the realm was as ancient as the law itself, and was uniformly adopted until the case of Dale *v.* Hall,[1] when the practice of declaring in assumpsit succeeded; but for four hundred years before that time the declaration was in tort on the custom.[2]

4. *Action on the Case.*

§ 423. Each of the two forms of action, and modes of considering the question above mentioned, has its peculiar advantages and inconveniences; and first, as to the *action on the case* for a breach of duty, or for a tort. As a general rule, where there is any doubt, as to the defendants, it is better if possible to declare in tort, rather than *ex contractu*, for the reason that the consequences of a misjoinder or nonjoinder of parties are less serious in the former than in the latter case.[3] In the case of Bretherton *v.* Wood, in the Exchequer Chamber,[4] there were too many defendants. The plaintiff below, in an action on the case against *ten* defendants as proprietors of a coach, for injuries sustained by the plaintiff, in consequence of negligence in driving, the jury found a verdict against *eight* of the defendants, and in favor of the other *two*. Dallas, C. J., who delivered the judgment of the Court, said: — "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of

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was cited by Lord Kenyon in Buddle *v.* Wilson, 6 T. R. 373. See also Govett *v.* Radnidge, 3 East, R. 63; Ross *v.* Johnson, 5 Burr. R. 2825; Dickon *v.* Clifton, 2 Wils. R. 319; Powell *v.* Layton, 2 B. & Pull. R. 365; Hamblay *v.* Trott, Cowp. R. 375; Bretherton *v.* Wood, 5 B. & Bing. R. 54; Orange Bank *v.* Brown, 3 Wend. (N. Y.) R. 158; Weed *v.* Schenectady and Saratoga Railroad Company, 19 Wend. (N. Y.) R. 534; Smith *v.* Seward, 3 Barr, (Penn.) R. 342; Pozzi *v.* Shipton, 8 Adol. & Ell. R. 963.

[1] Dale *v.* Hall, *ub. sup.*, decided in 1750.

[2] Per Bayley, J., in Ansel *v.* Waterhouse, 2 Chitt. R. 1.

[3] See the cases referred to in the preceding section.

[4] Bretherton *v.* Wood, 3 B. & Bing. R. 54.

the realm, or in other words, by the Common Law, to carry and convey their goods and passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the Common Law, which action wants not the aid of a contract to support it. It appears by the different books of entries, Brownlow Redivivus, 11; Clift. 38, 39; Mod. Ent. 145, that this form of action is a very ancient use. Nor is it material whether redress might or might not have been had in an action of *assumpsit*: that must depend on the circumstances of which this Court has no knowledge; but whether the action of *assumpsit* might or might not have been maintained, still *this action on the case* may be maintained. The action of *assumpsit*, as applied to cases of this kind, is of modern use. If the action be not founded on a contract, but on breach of duty depending on the Common Law, on a tort or misfeasance, it cannot be contended that the judgment is erroneous; for, from the nature of the case, and the form of the action, it is several and not joint, and may be maintained against *some only* of those against whom it is brought." [1]

§ 424. So in M'Call *v.* Forsyth, in Pennsylvania,[2] it was held, that for an injury done to a passenger by the upsetting of a stage-coach, the remedy of the party might be either case or assumpsit; and that if the former is adopted, he may recover against all those who are liable; but if the latter, the plaintiff, to entitle him to recover, must prove the liability of all the parties sued.

§ 425. It has long been well settled in England, that if a

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[1] The decision in this case was cited and approved by Baron Parke, in giving judgment in Wyld *v.* Pickford, 8 M. & Welsb. R. 490.

[2] M'Call *v.* Forsyth, 4 Watts & S. (Penn.) R. 179. A verdict against one defendant, and in favor of another, held good in Smith *v.* Seward, 3 Barr, (Penn.) R. 342.

carrier in partnership is sued *singly* in an action arising *ex delicto*, he cannot plead the non-joinder of the others in abatement or in bar, or give it in evidence under the general issue; for a plea in abatement can only be adopted in those cases where regularly all the parties *must* be joined, and not where the plaintiff *may* or *may not* join them at his election.[1] Therefore, to an action on the case against the defendants, part owners of a ship for the negligence of their servant in running down a ship laden with sugar belonging to the plaintiff, whereby the sugar was lost, it was held, that the defendants could not plead in abatement, that there were other part owners not joined in the suit, because the action being *ex delicto*, the trespass was several.[2] So, in an action on the case against a common carrier by land, for not safely carrying a passenger, it was held, that the defendant could not plead in abatement the non-joinder of a co-proprietor.[3]

§ 426. The subject was very fully considered by Mr. C. J. Savage, in giving the opinion of the Court in the case of Orange Bank *v.* Brown & *five others*, in the Supreme Court of the State of New York.[4] In this case there were too few defendants. The defendants were charged in the declaration as common carriers, for the loss of property put on board their steamboat for transportation, and the *gravamen* was stated to have arisen from a breach of duty; and there was a plea in abatement that there were *fifty-four* other proprietors who were jointly liable. The learned Judge, after an elaborate review of the English authorities, commencing with one of the earliest cases concerning the point in question, viz. Boson *v.* Sandford,[5] and ending with the

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[1] Gow on Part. 201; Childs *v.* Sands, Carth. R. 294.
[2] Mitchell *v.* Tarbutt, 5 T. R. 649.
[3] Ansel *v.* Waterhouse, 2 Chitt. R. 1.
[4] Orange Bank *v.* Brown, 3 Wend. (N. Y.) R. 158.
[5] Boson *v.* Sandford, 2 Show. R. 478.

case of Bretherton *v.* Wood, decided in 1821,[1] says: "It is not to be denied, that there has been a difference of opinion between some of the English Judges on the question, whether an action against a common carrier is an action founded on a tort or on a contract. Dallas, C. J. seems to put that question at rest, by bringing it to a very fair test: Does it require the plaintiff to show a contract, express or implied, to support it? The action on the case was at last decided to be for a tort.[2] This was clearly the opinion of Lord Mansfield, in the case cited by C. J. Mansfield;[3] and all the cases in which it has been held necessary to join all the joint owners, have been said by distinguished Judges to be clearly actions upon a promise. Much of the confusion has probably grown out of the forms of declaring in some of the cases, where it is difficult to determine whether the promise and undertaking often stated in the count, or the custom of the realm, also stated, is intended by the pleader to be the foundation of the action. I apprehend the true rule now is, that the action solely upon the custom is an action of tort; that in such action all or any number of the owners of a vessel, coach, or any kind of conveyance used by common carriers, may be sued, and judgment may be rendered on a verdict against all or a part only of those against whom the action is brought; the plaintiff has his choice of remedies, either to bring assumpsit or case; and that when one or the other action is adopted, it must be governed by its own rules. But if the plaintiff states the custom, and also relies on an undertaking general or special, as in Boson *v.* Sandford,[4] and some others, then the action may be said to be *ex delicto quasi ex contractu*, but in reality is founded on the contract, and to be treated as such. In Allen *v.* Sewall, in

[1] Bretherton *v.* Wood, 5 Bro. & Bing. R. 54; and *ante*, § 423.

[2] Ibid.

[3] Powell *v.* Layton, 5 Bos. & Pul. R. 365, in which the opinion was given by Sir James Mansfield, C. J. citing the opinion of Lord Mansfield in Hambly *v.* Trott, Cowp. R. 375.

[4] Boson *v.* Sandford, 2 Show. R. 478.

giving the opinion of the Court, I remarked that all the co-partners should have been sued, as the action was *quasi ex contractu*. It was unnecessary in that case to say any thing on that point, as no plea in abatement had been pleaded ; and upon further examination, I am satisfied the remark is incorrect, for the reasons above assigned.[1] It is certainly now settled in England, that an action against a common carrier upon the custom, is founded on a breach of duty ; that it is a tort or misfeasance ; and it follows, that it is joint or several. In the case now under consideration all the counts are substantially upon the custom and in case, though some of them contain expressions similar to those used in actions of assumpsit ; but there is none of them which relies upon any undertaking of the defendants, and they all state the gravamen to be a breach of duty. I am therefore of opinion, that an action on the case against a common carrier belongs to the class of actions arising upon a tort or misfeasance *ex delicto ;* and that such actions, being as well several as joint, it is unnecessary to join all the tort-feasors." [2]

§ 427. It has been said, that if the plaintiff himself shows in his declaration or other pleading, that the tort was jointly done by the defendant and A. B., the action shall abate ; [3] but Mr. Sergeant Williams observes, there is no ground for the distinction.[4] The position which was advanced, that where there is any doubt as to the parties defendants, it is better, if possible, to declare in tort rather than *ex contractu*, because the consequences of a misjoinder or non-joinder are less serious in the former than in the latter case, is therefore entirely supported.[5]

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[1] Allen *v.* Sewall, 2 Wend. (N. Y.) R. 338. The action in this case was an action on the case as for a tort.

[2] See also Weed *v.* Schenectady and Saratoga Railroad Company, 19 Wend. (N. Y.) R. 534.

[3] Brickhead *v.* Archbishop of York, Hob. R. 199.

[4] 1 Wms. Saund. 291 ; Coll. on Part. 640.

[5] See Browne on Actions at Law, 310 ; 2 Chitt. Pl. 156, note (h).

§ 428. Another advantage of declaring in case upon a tort, when the circumstances are such as to give the plaintiff an election, is, that it is not necessary to state the undertaking with as much form as is required in an action of assumpsit;[1] for it is a general well settled principle, that in declaring on an executory contract, great exactness is demanded, and the plaintiff must prove his case as laid.[2] In all cases where the action is not on the contract, but for a breach of collateral duty, the *gist* is a personal tort;[3] and it is enough, that the proof conforms substantially to the statements in the declaration.[4] Thus, where the allegation was negligence in the conduct and management of the fires in the furnaces of a steamboat, while such boat was passing the plaintiff's building; it was held competent to prove, that the fires were unusually large when the boat left the dock, shortly before.[5]

§ 429. In an action on the case against a common carrier, it is not necessary to state what his duty was; it being sufficient to state, as inducement, that he is a common carrier, the delivery of the goods, &c. to be carried from A. to B. for certain hire or reward; and, as injury, that the defendant lost the goods through negligence, omitting the allegation of any

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This is not merely a formal distinction. A Court of Law will not sustain an action for contribution between two joint trespassers; or between defendants condemned in damages for a joint offence, or cause of action arising *ex delicto;* and the defendant on whom the whole is levied has no remedy over. And there appears to be no decision to the contrary in Chancery. Per Chancellor Kent, in Peck *v.* Ellis, 2 Johns. (N. Y.) Ch. R. 136, and the cases there cited of Lingard *v.* Bromley, 1 Ves. & Bea. R. 117; Phillips *v.* Biggs, Hard. R. 164.

[1] Per Parke, Baron, in Wyld *v.* Pickford, 8 M. & Welsb. R. 443.

[2] See opinion of Cowen, J., in Weed *v.* Schenectady and Saratoga Railroad Company, and the cases there cited.

[3] Zell *v.* Arnold, 2 Penn. R. 292, Opinion of Gibson, C. J., who said it was emphatically the *gravamen* in an action against a barber for barbering his customer, *negligenter et inartificialiter.* 2 Bulst. R. 333.

[4] Ib.; 1 Arch. N. P. 412.

[5] Cook *v.* Champlain Trans. Co. 1 Denio, (N. Y.) R. 91.

promise.[1] The liability of a common carrier for the loss of goods being a liability founded on the custom of the realm, it is not only unnecessary, but improper, to recite such custom; because it tends to confound the distinction between special customs which ought to be pleaded, and the general customs of which the Courts are bound to take notice without pleading.[2]

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[1] 1 Arch. N. P. 412; and see opinion of Cowen, J., in Weed *v.* Schenectady and Saratoga Railroad Co. *ub. sup.*

[2] 1 Chitt. Pl. 248. As it respects the *inducement*, the declaration states, — "For that whereas the defendant before and at the time of the delivery of the goods and chattels to him as next hereinafter mentioned, was, and thence hitherto has been and still is, a common carrier of goods and chattels for hire from —— to ——; and whereas also the plaintiff, whilst the defendant was such common carrier as aforesaid, to wit, on ——, caused to be delivered to him the said defendant, and the defendant then accepted and received of and from the plaintiff, a certain box containing divers goods and chattels, to wit, [specifying them] of the plaintiff of great value, to wit, of the value of —— dollars, to be safely and securely carried and conveyed by him the said defendant from —— aforesaid to —— aforesaid, and there, to wit, at —— aforesaid, safely and securely to be delivered for the plaintiff, for certain reasonable reward to him the defendant in that behalf." In respect to the *injury:* "Yet the defendant, not regarding his duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud, and injure the plaintiff in this behalf did not, nor would, safely or securely carry or convey the said box and its contents aforesaid from —— aforesaid to —— aforesaid, nor there, to wit, at —— aforesaid, safely or securely deliver the same for him the plaintiff; but on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted himself in the premises, that by and through the carelessness, negligence, and fault of the defendant in the premises, the said box and its contents aforesaid, being of the value aforesaid, became and were wholly lost to the plaintiff." Then as to the *damage:* "Whereby, &c., (*stating special damage, if any*) to the plaintiff's damage of —— dollars, and thereupon he brings suit." 1 Arch. N. P. 438. The plea of "not guilty" in this case operates a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were carried. Ib. The advantages of an action on the case, other than those that the defendant cannot plead in abatement the non-joinder of other parties as defendants, and that the

5. *Declaration in Action on the Case may contain a Count in Trover.*

§ 430. Another advantage of bringing an action on the case against a carrier for a breach of duty, is, that a count in *trover* may be joined with the other counts. In the case of Dickon *v.* Clifton,[1] the declaration was in case with a count in trover; and Lord C. J. Wilmot observed, "I own that in many books it is reported, that trover and a count against a common carrier, cannot be joined, but common experience and practice is now to the contrary." The true *test*, said he, "to try whether two counts can be joined in the same declaration, is to consider and see whether there be the *same judgment* in both, and not whether they require the same plea; and wherever there is the *same judgment* in both, I think they may be joined." Clive, J., said, "I am of my Lord's opinion, that the true *test* is to see whether both counts require the *same judgment;* and in this case they do, and the plaintiff must have judgment." Lord Ellenborough, C. J., in Govett *v.* Radnidge,[2] recognizing the observation of Lord C. J. Wilmot in the case just cited, added, "that when the counts were framed in this manner, it was then the daily and well warranted practice, to join them."[3]

§ 431. An essential component part, however, of the right to maintain a count in trover, is a *conversion* by the defendant, which term denotes an act, and is therefore in legal, as well

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plaintiff may recover if he prove one of several defendants to be liable, which he cannot do in assumpsit, are explained by Lord Ellenborough, in Govett *v.* Radnidge, 3 East, R. 70.

[1] Dickon *v.* Clifton, 2 Wils. R. 319.

[2] Govett *v.* Radnidge, 3 East, R. 69.

[3] In an action on the case, the counts may be joined with a count in trover. M'Cahan *v.* Hirst, 7 Watts, (Penn.) R. 175. A count in trover was joined with counts in case in Dwight *v.* Brewster, 1 Pick. (Mass.) R. 50; and see also Moses *v.* Norris, 4 N. Hamp. R. 304; Wyld *v.* Pickford, 8 M. & Welsb. R. 443; and see *ante*, § 38, 63.

as in ordinary, construction, very different from an omission.[1] A conversion is, in the language of the law, a *misfeasance*;[2] it consists in the commission of a tortious act, and is, (to be more definite,) the wrongful assumption of the right of ownership over property to the prejudice of the superior owner; as, taking property by assignment from one who had no authority to dispose of it.[3] The very assuming, says Lord Holt, to oneself the right to dispose of another man's goods, is a conversion;[4] and, accordingly, it has been holden, that if a carrier draw out a part of a vessel and fill it up with water, it is a conversion of all the liquor.[5] It is, therefore, very clear, that if a carrier should sell and transfer the goods intrusted to him for transportation, it is a conversion, because the bailment would be ended.[6] A. undertook to carry flour from B. to a certain place, and through mistake deposited by the way a part of the flour, which was taken away by C. On the refusal of B. to receive part only, C. took the remainder and paid A. for the whole. This was held to amount to a conversion by the carrier, which would support a count in trover.[7] The master of a ship which is completely wrecked in a foreign port, has no power of selling the goods on freight saved from the wreck, unless there be an absolute necessity for such sale;[8] and such sale, though *bonâ fide* and in market overt, is not binding on the owner of the goods, if the con-

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[1] Ross *v.* Johnson, 5 Burr. R. 2827; Dwight *v.* Brewster, 1 Pick. (Mass.) R. 50.

[2] For the distinction between *misfeasance* and *negligence*, see *ante*, § 12.

[3] M'Combie *v.* Davis, 6 East, R. 538.

[4] Baldwin *v.* Cole, 6 Mod. R. 212.

[5] Richardson *v.* Atkinson, 1 Str. R. 576.

[6] See *ante*, § 349, *et seq.* Every bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bonâ fide*. Cowper *v.* Willomatt, 1 C. B. 672, thus cited in 6 Harr. Dig. 145.

[7] Bullard *v.* Young, 3 S. (Ala.) R. 46. See also Herman *v.* Drinkwater, 1 Greenl. (Me.) R. 27.

[8] See *ante*, § 354, and the authorities there referred to.

duct of the vendee imports knowledge of the infirmity of the master's title to sell.[1]

§ 432. So a count in trover will be supported by a delivery of the goods by the carrier or his servant to a wrong person, even though such mis-delivery occurred by mistake;[2] and that there has been no intentional wrong makes no difference.[3] A mis-delivery may be made by a careful person, who has been deceived by an artifice calculated to circumvent the most careful person, and still it is a conversion, (though not necessarily a proof of want of ordinary care,) because it gives the dominion over the goods to another.[4] Therefore, trover can be supported against a carrier, who, under a forged order, delivers goods to a wrong person.[5]

§ 433. But where the act itself is not of a character as decisive as in the abovementioned cases, other circumstances then became requisite to show a conversion; and for this purpose a *demand* and *refusal* are usually relied on to make

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[1] Freeman *v.* East India Company, 1 D. & Ry. R. 234; and see also as to when trover will lie, *ante*, § 38, 63. If any bailee for hire of a thing for a limited period, should sell the thing, the bailment would be ended, and a suit might be maintained against him by the bailor for a tortious conversion thereof. Story on Bailm. § 413; Sargent *v.* Gile, 8 N. Hamp. R. 325. A judgment in an action of assumpsit against a bailee for a breach of his contract to transport and deliver the property bailed, in which the owner has recovered damages for the value of the property, without satisfaction, is no bar to an action of trover against a third person who has purchased the property. Hyde *v.* Noble, 1 N. Hamp. R. (2d series) 494.

[2] See *ante*, § 324, 325, 326. If a warehouseman mis-deliver by mistake, it is a conversion, because it is an act of commission, and not merely omission, as the loss is. Devereux *v.* Barclay, 2 B. & Ald. R. 702.

[3] Ibid.; Hawkins *v.* Hoffman, 6 Hill, (N. Y.) R. 588; Clark *v.* Spence, 10 Watts, (Penn.) R. 335, per Rogers, J.; Willard *v.* Bridge, 4 Barb. (N. Y.) R. 361.

[4] Per Parke, B., in Wyld *v.* Pickford, 8 M. & Welsb. R. 443; Youl *v.* Harbottle, Peake, N. P. Cas. 49.

[5] *Ante*, § 321; and see Lubbock *v.* Inglis, 1 Stark. R. 120.

the act of conversion complete. The mere non-delivery of the goods will not constitute a conversion on the part of the carrier; but if he has them in his possession, and refuses to give them up on demand, it is evidence of a conversion. But the demand and refusal are merely evidence of a conversion, and will not establish it where it appears that no conversion has taken place; as where the goods in the carrier's custody are proved to have been lost through negligence, or have been stolen; and therefore a count in trover will not be supported in such cases, though a count in case will be.[1] In Dwight *v.* Brewster, in Massachusetts,[2] the declaration (which contained a count in trover) was on the undertaking of the defendants (stage-coach proprietors) to carry for the plaintiffs a package containing bank notes, which bank notes were by the defendants lost. The Court held, that the count in trover was not supported, because there was no evidence of any actual conversion, or of any demand and refusal; that the bank notes came lawfully into the possession of the defendants, and that some misapplication of them, or refusal to deliver them, must be proved to entitle the plaintiffs to recover on a count in trover. The same doctrine was held by Bronson, J., in delivering the opinion of the Court in Hawkins *v.* Hoffman, in New York.[3]

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[1] Salk. R. 655; Bull. N. P. 44. Said by Lord Ellenborough, "That what begins in contract, a non-performance of what the party undertakes to do; or a bare non-delivery of what he undertook to deliver, is not to be considered as of itself amounting to a *tortious* conversion. The principle was recognized some time ago in the K. B. in an action against a carrier for not delivering goods. If the carrier says he has the goods in his warehouse, and refuses to deliver them, that will be evidence of a conversion, and trover may be maintained, but not for a bare non-delivery without any such refusal." Anon. 4 Esp. R. 157; and see Attersol *v.* Bryant, 1 Campb. R. 409, and Opinion of Lord Kenyon in Youl *v.* Harbottle, *ub. sup.*; and Ross *v.* Johnson, 5 Burr. R. 2825.

[2] Dwight *v.* Brewster, 1 Pick. (Mass.) R. 50.

[3] Hawkins *v.* Hoffman, 6 Hill, (N. Y.) R. 588. And see also Moses *v.* Norris, 4 N. Hamp. R. 304; Graves *v.* Ticknor, 6 Ib. 537; Beardslee *v.* Richardson, 11 Wend. (N. Y.) R. 25. And see *ante*, § 38, 63.

6. *Action of Assumpsit.*

§ 434. The action of *assumpsit* is the well known and a common remedy for the breach of a contract not under seal; and it not only lies upon all *express* contracts not under seal, but also in all cases where the law *implies* a contract. When a person undertakes any office, employment, trust, or duty, he thereby, in contemplation of law, *impliedly contracts* with those who employ him, to perform that with which he is intrusted, with integrity, diligence, and skill; and if he fails to do so, it is a breach of contract for which the party may have his remedy, in most cases by action of assumpsit as well as by action on the case. If, for instance, through any gross and culpable negligence of an attorney, his client be damnified, the client may have his remedy, by action of assumpsit or upon the case. So if a common innkeeper allow the goods of his guests to be stolen, or a farrier lame a horse in the shoeing of him; and so if a *common carrier* or bargemaster lose or injure goods given to him to carry. In all these cases of implied promises, they are in law treated exactly as if they were express promises; and the declaration states the promise exactly as the law implies it.[1] But assumpsit does not lie where there is no certain duty or contract express or implied; and where there is an implied promise, an express promise different from the implied one, cannot be stated in the declaration, unless there be some other consideration to support it.[2]

§ 435. By considering the transaction between a carrier and his employer as constituting a contract between the parties, and by adopting accordingly the action of assumpsit, the plaintiff has the advantage of joining the common money

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[1] 1 Arch. N. P. 40.

[2] 1 Steph. N. P. 238; 1 Arch. N. P. 41; Hopkins *v.* Logan, 5 M. & Welsb. R. 241.

counts, if he has other causes of action to which they are applicable.[1] Another advantage of the action of assumpsit

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[1] 1 Chitt. Pl. 115, 418. The following is Mr. Chitty's form of declaration against a carrier by land. (2 Chitt. Pl. 355, 7th edit.) "For that whereas the said defendant, before and at the time of the making of his said promise and undertaking hereinafter next mentioned, was a common carrier of goods and chattels for hire, in and by a certain wagon, (*or* 'coach') from a certain place, to wit, from —— to a certain other place, to wit, to ——, to wit, at, &c. (*venue.*) And the said defendant being such carrier as aforesaid, the said plaintiff heretofore, to wit, on, &c. (*day of delivery or about it*) at, &c. (*venue*) aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, at, &c. (*venue*) aforesaid, certain goods and chattels, to wit, &c. [*describe them minutely or as in trover*] of the said plaintiff, of great value, to wit, of — *l.* of lawful money of Great Britain, to be taken care of, and safely and securely carried and conveyed by the said defendant, as such carrier as aforesaid, in and by the said wagon (*or* 'coach') from, &c. aforesaid, to, &c. aforesaid (or merely say to, &c. aforesaid, omitting *the place from whence they were to be carried*) and there, to wit, at, &c. aforesaid, to be safely and securely delivered by the said defendant for the said plaintiff; and in consideration thereof, and of certain reward to the said defendant in that behalf, he the said defendant being such carrier as aforesaid, then and there, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and faithfully promised the said plaintiff to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by the said wagon, (*or* 'coach') from, &c. aforesaid, to &c. aforesaid, (or to, &c. aforesaid) and there, to wit, at, &c. aforesaid, safely and securely to deliver the same for the said plaintiff. And although the said defendant, as such carrier as aforesaid, then and there had and received the goods and chattels for the purpose aforesaid, yet the said defendant, not regarding his duty as such carrier, nor his said promise and undertaking so made as aforesaid, but contriving and fraudulently intending, craftily and subtly, to deceive and injure the said plaintiff in this behalf, hath not taken care of the said goods and chattels, or safely or securely carried or conveyed the same from, &c. aforesaid, to, &c. aforesaid, (or to, &c. aforesaid) nor hath there, to wit, at, &c. aforesaid, safely or securely delivered the same for the said plaintiff; but on the contrary thereof, he, the said defendant, being such carrier as aforesaid, so carelessly and negligently behaved and conducted himself, with respect to the said goods and chattels aforesaid, that by and through the mere carelessness, negligence, and improper conduct of the said defendant and his servants in this behalf, the said goods and chattels being of the value

is, that it will survive against the executor.[1] On the other hand, the plaintiff is bound to sue all the parties who are jointly liable, and must prove that all the defendants in the action are liable, which we have seen is not so, if he declares in an action on the case for a tort. In declaring in the form of assumpsit, the plaintiff is also precluded from joining a court in *trover*, inasmuch as counts upon a promise and upon a tort cannot be joined.[2] But assumpsit is maintainable when trover will lie, as where the cause of action consists in a misfeasance, where, for instance, the carrier, instead of conveying the parcel according to his directions,

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aforesaid, afterwards, to wit, the day and year aforesaid, at, &c. (*venue*) aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid."

Then add a general count for not taking proper care of the goods. (2 Chitt. Pl. 342, 7th edit.) "And whereas also, heretofore, to wit, on, &c. (*any day while the defendant had the goods, and before title of declaration*) at, &c. (*venue*) in consideration that the said defendant at his special instance and request, then had the care and custody of divers goods and chattels of the said plaintiff, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said *first* count mentioned, [*or if this be the first count on the subject, set out the goods and value,*] he the said defendant undertook, and then and there faithfully promised the said plaintiff to take due and proper care thereof, whilst the said defendant so had the care and custody of the same; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, whilst the said defendant so had the care and custody of the said goods and chattels, took so little, and such bad and improper care thereof, that the same, afterwards, to wit, on the day and year aforesaid, &c. (*venue*) aforesaid, became and were greatly damaged and injured, and wholly lost to the said plaintiff."

[*Add counts for money had and received, and upon an account stated.*]

[1] 1 Chitt. Pl. 116. Case will not lie against an executor or administrator of a carrier, because it is in tort, and the plea is "not guilty," but assumpsit, which is another action for the same cause, will lie. Per Lord Mansfield, in Hambly *v.* Trott, Cowp. R. 375. And see 2 Greenl. Ev. § 208; Patton *v.* Magrath, 1 Rice, (S. C.) R. 162.

[2] As was conceded in Corbett *v.* Packington, 6 B. & Cress. R. 268; 1 Saund. R. 312; 1 Chitt. Pl. 156.

transfers it to another carrier for that purpose, whereby the parcel is lost.[1] And trover even will lie against an executor for *chattels* continued *in specie* in his hands, the conversion being laid to have been by the executor.[2]

7. *Distinctive Character of the Declaration.*

§ 436. There has been a diversity of opinion not only as to the proper remedy in particular cases, but as to the *distinctive feature* in the declaration.[3] The general rule, as we have seen, being that in actions *ex delicto* the non-joinder of a co-defendant cannot be pleaded in abatement, it has, in England, been a matter of doubt, whether such a plea would be good to a declaration framed in case, but founded on contract; and whether judgment could, as in actions founded on tort, be given for some defendants and against others.[4] In Weal *v.* King,[5] it was held, that an action on the case, alleging a deceit by means of a warranty, though laid in tort, was founded on contract.[6]

§ 437. In the case of Pozzi *v.* Shipton,[7] the declaration contained no words of contract, but, on the other hand, it did not expressly aver that the defendants were carriers. The Court of King's Bench, however, were of opinion, that the declaration might be read as founded on the general

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[1] Sleat *v.* Fagg, 5 B. & Ald. R. 349.

[2] Hambly *v.* Trott, Cowp. R. 373.

[3] See opinion of Gibson, C. J., in Smith *v.* Seward, 3 Barr. (Penn.) R. 345; and opinion of Lord Ellenborough in Govett *v.* Radnidge, 3 East, R. 70.

[4] But now in England (by stat. 11 Geo. 4, and 1 Will. 4, c. 68, s. 5,) the non-joinder of a co-defendant in *assumpsit* against common carriers, is no ground for pleading in abatement. Brown on Part. to Actions, 156.

[5] Weall *v.* King, 12 East, R. 452.

[6] This decision is recognized by the Court in Hunt *v.* Wynn, 6 Watts, (Penn.) R. 47.

[7] Pozzi *v.* Shipton, 8 Adol. & Ell. R. 963.]

custom of the realm, and consequently that a verdict which had been obtained against one defendant and in favor of the other, was maintainable. The declaration, which was in case, stated, that the plaintiff delivered to the defendants, and they accepted and received from him, goods, to be taken care of and conveyed by the defendants from Liverpool to Birmingham, and there delivered to A., for the plaintiff, for reasonable reward, to the defendants in that behalf; and thereupon it became the duty of the defendants to take due care of such goods while they so had the charge thereof, for the purpose aforesaid; and to take due and reasonable care in and about the conveyance, and delivery thereof as aforesaid; yet the defendants, not regarding their duty, &c., did not nor would take due care, &c., and that the goods were injured to the plaintiff's damage. At the trial it was proved satisfactorily, that the defendant, against whom the verdict was obtained, was a common carrier, and it was not objected at the time, that proof of an express contract was necessary in order to sustain the declaration. Under these circumstances, the Court of King's Bench refused to disturb the verdict, observing, that, as the language of the declaration was consistent with the action, being founded on the general custom, and as there were no words of express contract, the Court, after verdict, was bound to read it as founded on the custom; and that it was not then necessary to say, whether the want of an express averment that the defendants were common carriers for hire, would have been good on special demurrer.

§ 438. In an action on the case, in Connecticut, alleging that the defendants, being joint proprietors of a line of stage-coaches from Hartford to Albany, undertook, in consideration of a certain sum paid by the plaintiff, to transport him and his baggage from the former to the latter place, within a certain time specified; and that having received the plaintiff and his baggage for that purpose, he detained the same on the road, and failed and neglected to perform their under-

taking; it was held, that the plaintiff could not recover against any of the defendants without proving a joint undertaking as alleged against all. Hosmer, C. J., who delivered the judgment of the Court, refers to the established and obvious distinction between an action founded on contract and one founded in tort; and said that the plaintiff's action was founded on contract and the non-performance, without the allegation of misfeasance or malfeasance; therefore, the plaintiff must, in every essential particular, prove the contract as he had alleged it.[1] In the case of Patton *v.* Magrath, in South Carolina,[2] the Court considered, that whether the declaration be considered as strictly a declaration in assumpsit, or as a declaration in case *ex quasi contractu*, the plaintiff must sue all joint contracting parties, or the defendants may plead in abatement; and that he must sue in the same action *only* the joint contractors, or he will fail at the trial.

§ 439. It has been asserted,[3] that the case of Corbett *v.* Packington,[4] has put the law on the subject of the distinctive feature of the declaration on satisfactory ground, by making the presence or absence of an averment not of *promise* only, but of *consideration* also, the criterion; for it is impossible to conceive of a promise without consideration, any more than a consideration without a promise, as an available cause of action; and when a consideration is not laid, the word *agreed* or *undertook*, or even the more formal word *promised*, must be treated as no more than inducement to the duty imposed by the Common Law. In Smith *v.* Seward, in Pennsylvania,[5] it was expressly held, that an averment of a promise and a consideration, are *both* essential to a declara-

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[1] Walcott *v.* Canfield, 3 Conn. R. 194.
[2] Patton *v.* Magrath, 1 Rice, (S. C.) R. 162.
[3] Per Gibson, C. J., in Smith *v.* Seward, 3 Barr. (Penn.) R. 342.
[4] Corbett *v.* Packington, 6 B. & Cress. R. 268.
[5] Smith *v.* Seward, *ub. sup.*

tion in contract; and that hence, a declaration averring an undertaking, in consideration that the public should be conveyed by means of defendant's ferry, and for hire, to receive and safely to convey, and that the plaintiff learning the said offer, did use the ferry, and commit his horse to defendant, in consideration of an undertaking to convey, was in *tort*.

8. *As to the Allegations, &c. in the Declaration.*

§ 440. Having endeavored to point out the difference between the two modes of proceeding against carriers on their liability to their employers, by action on the case and by the action of assumpsit, and to show the advantages peculiar to each; and having given the form of declaring in each;[1] it is now proposed to consider more in detail the allegations, &c. in declaring in each. It is laid down, that though the remedy by *action on the case* against carriers is on some accounts preferable to *assumpsit*, yet the form of action does not materially affect the evidence necessary to maintain it.[2] The declaration in case must correctly state the contract, or the particular duty or consideration from which the liability results, and on which it is founded; and a variance in the description of the contract, or the particular duty or consideration from which the liability results, and on which it is founded, though in an action *ex delicto*, may be as fatal, as in an action in form *ex contractu*.[3] As has been affirmed by a learned Judge, "in an action on a tort arising out of a contract, the statement of the contract is often as material as in an action *on* the contract; and in either form of action, if the variance *is on a point which goes to the very essence of the*

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[1] Form in action on the case, *ante*, § 429, n. 3; Form in the action of assumpsit, *ante*, § 435, n. 3.

[2] 2 Greenl. Ev. § 208; 1 Chitt. Pl. 161, 162, 7th edit. [125, 126.]

[3] 2 Greenl. Ev. § 208; 2 Steph. N. P. 992; Max *v.* Roberts, 12 East, R. 89; Govett *v.* Radnidge, 3 Ib 70; Bretherton *v.* Wood, 5 B. & Bing. R. 54.

action, it is fatal."[1] As the inducement in declarations *ex delicto* relates to material matter, there will be a fatal variance, if, instead of relying on the *general* statement, the plaintiff enters upon a detailed statement, and there be a misdescription. As in an action for slander of a physician, even if it be not necessary in general for the party to show, that he has regularly taken his degree, it is necessary if the party allege in his declaration, that he had *duly taken* the degree of doctor of physic.[2]

§ 441. But in torts, the plaintiff may prove a part of his charge if the averment be divisible, and there be enough proved to support his case. In a declaration, for instance, for slandering the plaintiff in two trades mentioned in the declaration, should there be proof of one trade only, the proof will support the declaration if the words apply to the latter trade.[3] In respect to such divisibility there is, however, a material distinction between the statement of torts and of special contracts; for in declaring upon the latter the contract must be stated correctly, and if the evidence differs from the statement, the whole foundation of the action fails, because the action is entire in its nature, and must be proved as laid.[4] A trivial variation is fatal, inasmuch as the contract given in evidence does not appear to be that on which the plaintiff declares;[5] and, therefore, where the declaration is on a promise to do several things, and one only is proved, there is a fatal variance. In an action of assumpsit against common carriers, the first count in the declaration alleged, that the defendants undertook and promised the plaintiff to carry and convey securely, by their coaches and railroad cars, *a trunk containing certain goods, &c. and bank-bills;*

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[1] Per Bosanquet, J., in Ireland *v.* Johnson, 1 Bing. New R. 162.

[2] Moises *v.* Thornton, 8 T. R. 308; and see Rex *v.* Everett, 8 B. & Cress. R. 114.

[3] Figgins *v.* Cogswell, 3 M. & Sel. R. 369.

[4] 1 Chitt. Pl. 334, 5th edit.

[5] Bull. N. P. 145; King *v.* Pippet, 1 T. R. 240.

but that they so carelessly conducted that the *trunk and its contents* were lost. The defendants moved a nonsuit on the ground, that there was a variance between the contract as stated in the declaration, and as proved on the trial; that the contract, as set forth, was to carry the *trunk* and money of the *plaintiff*, whereas it was proved that the trunk belonged to one *M.*, a stranger. The Court held, by Cowen, J., that the proof at most was of a contract with the plaintiff to carry the *money* only; and that the declaration failed in describing correctly a special executory contract, wherein great exactness is always demanded.[1] So to allege a consideration for a promise, in *addition* to the true consideration, moving thereto, not supported by the proof, will be cause of nonsuit.[2] The circumstance, that if assumpsit be adopted, the contract or promise must be formally stated in the declaration, and that in case it is otherwise, constitutes the principal difference between the two forms of action.[3]

§ 442. If the declaration in assumpsit state an absolute contract, and the proof is of a contract *in the alternative*, the plaintiff cannot recover, though he may have determined his option.[4] Where it appears by the terms of the contract, for the breach of which the action is brought, it was at the option of the defendant to deliver *this* or *that* quantity of goods at one time, and the remainder at another, it ought to be thus stated.[5] Where a contract was in the alternative to transport *fifteen* or *twenty* tons of marble from one place to another, it

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1 Weed *v.* Schenectady and Saratoga Railroad Co. 19 Wend. (N. Y.) R. 534. As no injustice had been done by the mere formal addition of "a trunk" in the declaration, the Court had no doubt, by an equitable construction of the law of New York in respect to amendment, of their power to allow an amendment, by striking the "trunk" from the declaration.

2 Stone *v.* Knowlton, 3 Wend. (N. Y.) R. 374.

3 Judin *v.* Samuel, 6 East, R. 333.

4 See 1 Chitt. Pl. 309; Yelv. R. 76, note by Metcalf; Hilt *v.* Campbell, 6 Greenl. (Me.) R. 109.

5 Penny *v.* Porter, 2 East, R. 2; and see Yate *v.* Willan, Ib. 134.

must be stated in the declaration according to the terms of it; and if it be stated as an absolute contract, for the transportation of *twenty* tons, and not fifteen *or* twenty tons, the variance is fatal.[1]

§ 443. In an action of special assumpsit against the defendant, as the master of a ship, for not safely conveying goods to a foreign port, consigned to the plaintiffs, evidence that the goods were seized in another port by the government, coupled with a letter of the defendant's, in which he acknowledged that he was accountable for the goods, is sufficient to warrant the jury to find for the plaintiffs, without any further proof of the cause of seizure. For the defendant, it was, however, objected, that there was a variance between the bill of lading and the declaration, and between the undertaking as laid in the first two counts and the breach assigned, the undertaking being laid to deliver for the plaintiffs at the island of Batavia, and the breach being that the defendant did not deliver to the plaintiffs. But C. J. Abbott said he would not nonsuit the plaintiffs upon this objection.[2]

§ 444. A declaration upon a promise alleging, that the defendant undertook to deliver a parcel of goods for the plaintiff, is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of the delivery. But if the declaration had been in trover, the plaintiff would have been entitled to recover, since the delivery of the goods to another amounted to a conversion.[3]

§ 445. The declaration may be on an executed consideration, in consideration of plaintiff having delivered the goods.[4]

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[1] Stone *v.* Knowlton, 3 Wend. (N. Y.) 374.
[2] Cullen *v.* M'Alpine, 2 Stark. R. 552.
[3] Samuel *v.* Darch, 2 Stark. R. 60.
[4] 2 Steph. N. P. 991.

Thus, where a count in a declaration against a carrier by water, alleged, that in consideration that the plaintiff, at the request of the defendant, had caused to be shipped on board the defendant's vessel a quantity of wheat, to be carried to a certain place for freight, to be therefore paid to the defendant, he undertook to carry the wheat safely, and deliver it for the plaintiff on a given day; but it appeared, that the defendant's undertaking to carry, was made before the whole of the wheat had been shipped on board the vessel; it was held, that the count might be supported, although it was objected, that the consideration for the promise was executory.[1]

§ 446. It is enough to allege in the declaration against a carrier for the loss of goods, that the *consideration* of their conveyance was of a certain reward, or of reasonable hire and reward, without stating what reward.[2] In the precedent in Dalston *v.* Janson,[3] the allegation is only that the carrier was to carry "for a reward to be therefore had." In Clarke *v.* Gray,[4] this general form of alleging the consideration in declaring in actions against carriers was sustained, after much deliberation, though it was proved that the carrier had limited his responsibility by a *notice* to a certain sum, unless goods above that value were entered and paid for accordingly. The declaration in this case was in assumpsit in the usual form; and it was held, that the notice in question amounted only to a limitation of damages, after a right to them had accrued by a breach of the contract, and was proper to be given in evidence to the jury in reduction of damages; but that it formed no part or qualification of the original contract for carriage; and that, consequently, it was not necessary to be shown to the Court, in the first instance, on the face of

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1 Streeter *v.* Horlock, 7 Moore, R. 283; 1 Bing. R. 34.

2 2 Saund. R. 74 *a*; 2 Chitt. Pl. (7th ed.) 337, n. (c.); 2 Steph. N. P. 994.

3 Dalston *v.* Janson, 4 Ld. Raym. R. 79.

4 Clarke *v.* Gray, 6 East, 564.

the record.[1] But if the provision be of such a nature as goes in discharge of the liability of the party under the contract altogether, in case a particular condition is not complied with, as where goods were not to be accounted for *at all*, unless properly entered and paid for; that will operate not merely in reduction of damages, but in bar of the action.[2] So if the carrier except his liability from loss occasioned by fire or robbery, it must be stated in the declaration.[3] Abbott, C. J., says: — "The result of all the cases is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made that under circumstances, he shall not be liable at all, that must be stated."[4] Declaration in case stated that the defendants were proprietors of the Y. & N. M. Railway Company, and of certain carriages for the conveyance of passengers, cattle, and goods and chattels upon the said railway for hire; that they received nine horses of the plaintiff to be safely and securely carried in the carriages of the defendants by the railway for hire; and that thereupon it was the duty of the defendants safely and securely to carry, and convey and deliver the

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[1] Lord Ellenborough in this case said, that a conflicting decision in Yate *v.* Willan, 2 East, R. 128, could not be supported in its full extent.

[2] Clay *v.* Willan, 1 H. Bl. R. 298. The general doctrine on the subject is stated by Lord Ellenborough to be, that it is sufficient to state in the declaration so much of any contract, consisting of several distinct parts, and collateral provisions, as containing *the entire consideration for the act, and the entire act which is to be done in virtue of such consideration;* and that the rest of the contract which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury in reduction of damages, but not necessary to be shown to the Court in the first instance on the face of the record. Clarke *v.* Gray, *ub. sup.*

[3] Latham *v.* Rutley, 2 B. & Cress. R. 20. In this case the action was assumpsit, that for a certain hire and reward, the defendants undertook to carry goods from, and deliver them safely at Dover; and the contract proved was, to carry and deliver safely (fire and robbery excepted,) it was held, that this was a variance.

[4] Latham *v.* Rutley, *ub. sup.*

horses of the plaintiff; and then averred the loss of one by reason of the insufficiency of one of the carriages. It appeared, that when the horses were received, a ticket was given to the plaintiff stating the amount paid by the plaintiff for the carriage of the horses, and the journey they were to go, and having at the bottom the following memorandum: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages, while travelling, or in loading or unloading." It was held, that the terms contained in the ticket formed part of the contract for the carriage of the horses; and that the alleged duty of the defendants safely and securely to carry and convey the horses, did not arise upon that contract. "It may be," said Lord Denman, C. J., "that, notwithstanding the terms of the contract, the plaintiff might have alleged, that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared, but has alleged a duty which does not arise upon the contract, as it appeared in evidence."[1] It was said that the stipulations proved by the defendants in this case at the trial, did not alter the effect of the contract stated in the declaration; and that notwithstanding the stipulation, the defendants were liable for the accident which happened to the horse; and Lyon *v.* Mills[2] was cited. But what was proved there was only a notice, and a *general* notice; but in the case in question the note proved was proved to contain the terms of a special contract entered into between the plaintiff and the defendants with respect to the acceptance of a particular kind of goods.

§ 447. If no special executory contract is relied on, it is

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[1] Shaw *v.* York and North Midland Railway Co. Queen's Bench, 1849; reported in Law Reporter for May, 1850, p. 16.

[2] Lyon *v.* Mills, 5 East, R. 428.

not necessary to be minute in alleging the *quantity* or *quality* of the goods to be conveyed;[1] or, at least, they may be stated with a less degree of certainty and accuracy than is required in an action of detinue or of replevin.[2] The law does not now, as formerly, require in the action of trover great precision and certainty in the description of the goods; and if the description is according to common acceptation, it is sufficient. Thus, trover for "a suit of knots" has been held sufficiently certain; or, for "a parcel of thread," without mentioning the quantity of it; such allegation being certain enough where damages only are to be recovered, and not the thing itself.[3] So the declaration against a carrier for the loss of goods need only state the nature of the goods with a certainty of description to a common intent; and, therefore, a carrier's pack has been held a sufficient certainty;[4] and so, where the declaration was for so many *sets* of "gold buttons," and a *set* of "Turkey stones and garnets;" for to such as are conversant with those things, a set is intended to be well known, and in what manner the precious stones are usually placed in such sets.[5]

§ 448. In case against a carrier, where the duty was alleged to be, safely to convey and deliver, the grievance may be stated to be non-delivery within a *reasonable time*.[6] The

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[1] 2 Chitt. Pl. n. (d) to p. 757, (7th edit.)

[2] 2 Saund. R. 74 *a*.

[3] Ib. n. (1), and cases therein cited.

[4] Jeremy on Carr. 123.

[5] Ibid. referring to Chamberlain *v.* Cooke, 2 Ventr. R. 78; and Herbert *v.* Lane, Style, R. 370.

[6] Raphael *v.* Pickford, 5 Man. & Grang. R. 551, and see *ante*, § 284. As to the form of the declaration in such case: The declaration stated, that on the 1st of August, 1842, the defendants were common carriers of goods for hire from London to Birmingham, and then proceeded to state, in the usual form, (see *ante*, § 429, n. 3,) the delivery of the goods to the defendants to be carried for hire, and to be delivered, and their duty safely to carry and deliver, and then averred, "that a *reasonable time* for the defendants' carrying and conveying and delivering the said goods as aforesaid,

pleas in the case referred to, were first, "not guilty;" secondly, "that the plaintiff did not deliver to the defendants, nor did the defendants receive from the plaintiff, the goods in the declaration mentioned, to be carried and delivered for the plaintiff by the defendants, *modo et forma;*" concluding to the country; and issue thereon. The jury returned a verdict for the plaintiff, and a rule *nisi* was obtained for entering a nonsuit. The Court, said Tindal, C. J., would first consider the allegation of the defendants' duty, and secondly, the allegation of the breach. He then proceeds to say: — "It was not denied that, if the action had been brought for the total loss of the parcel, and the evidence had shown that it had *never* been delivered, the plaintiff would have been entitled to recover upon the declaration as now framed; and, if so, then it necessarily follows that the evidence given as to the contract and duty of the defendants would prove the *duty* as laid. Neither could it be denied, that if it had been alleged to be the defendants' duty to deliver within a reasonable time, the same evidence would have been sufficient to support that allegation, the duty to deliver within a reasonable time being merely a term ingrafted by legal implication upon a promise or duty to

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elapsed before the commencement of the suit;" breach, "that the defendants, neglecting their said duty in that behalf, did not safely and securely carry and convey the said goods from London to Birmingham aforesaid, or at Birmingham aforesaid safely or securely deliver the same for the plaintiff, but then so negligently and improperly behaved and conducted themselves, that, by and through the negligence, carelessness, and default of the defendants in the premises, the said goods, then and before the commencement of the suit, became and were and are totally lost to the plaintiff; and, by reason of the premises, the plaintiff was before the commencement of the suit necessarily detained in Birmingham aforesaid, and obliged to waste and consume his time, to wit, eight days from the day and year aforesaid, in and about attempting to procure the delivery to him of the said goods; and he thereby also lost great profits, to wit, profits to the amount of £5, which he would have derived from the delivery of the said goods, if they had arrived in Birmingham aforesaid, to divers persons to whom the plaintiff had sold the same, &c."

deliver generally. No valid objection, therefore, exists to the proof of duty as alleged. Whether such allegation would have been good upon *special demurrer*, if the only breach had been the non-delivery within a reasonable time, is *another question*, not material to our present inquiry. But it is said, no such breach is alleged in this declaration, and yet that is the only breach supported by the evidence. But we think that the breach in this declaration may be read as, in effect, stating that the defendants did not within a reasonable time, or at any time afterwards, deliver the goods to the plaintiff. And if the breach had been so in form, it would have been sufficient for the plaintiff to prove so much of the breach as would support his right of action; and as the onus of proving the delivery would rest upon the defendants, unless they proved a delivery within a reasonable time, the plaintiff's right of action, and, consequently, the breach alleged, would be established. We are, therefore, of opinion that the plaintiff is entitled to retain his verdict."

§ 449. A material variance between the allegation in the declaration and the evidence of the *termini*, is fatal. Thus, where the conveyance of goods was averred to be from W., in the county of Middlesex, to T., in Essex, but the contract proved, was for a conveyance of goods from Aldgate to the City of London, the variance, it was held, was fatal.[1] But an averment of a contract to carry goods from London to Bath, is supported by evidence of a contract to carry from Westminster to Bath; for the reason that London must be taken in the enlarged and popular sense of a collective name, and not in a limited sense, applicable to what is strictly the *city*.[2] Indeed, if the evidence as to the *termini* supports substantially the allegation in the declaration, and is not inconsistent with it, there is no variance. As another instance; the plaintiff alleged, that defendant, having agreed

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[1] Tucker *v.* Cracklin, 2 Stark. R. 385.

[2] Beckford *v.* Crutwell, 5 C. & Payne, R. 242.

to convey her safely by his coach from London to Blackheath, neglected his duty, by permitting the horses to move on while she was getting up, whereby she was thrown down and injured; it was held to be no variance, that the defendant's coach ran from Charing Cross to Blackheath, and that the plaintiff got up at the Elephant and Castle; though the defendant had inscribed on his coach, "London to Blackheath." The agreement was construed by the Court according to the intention of the parties, by which London was to be understood, not the *city*, strictly speaking, but what is *usually called* London. If Westminster, said Best, C. J., be included in a place in common parlance styled London, even with its separate jurisdiction, *à fortiori* might the Elephant and Castle be included, which is nearer to the city than Westminster.[1] Again, as the *gist* of the action is the non-delivery at the place the thing should go *to*, the terminus *a quo* is immaterial.[2] In case the declaration stated, that the plaintiff delivered a trunk to the defendant to be put into a coach at Chester, in the county of Chester, to wit, at, &c., and safely to be carried to Shrewsbury, and that, through the defendant's negligence, it was lost. It appeared in evidence, that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separate from the county of Chester at large, but within its ambit; and it was held, that this was not a material variance, but that the declaration was supported by the evidence; as no evidence was given of any other place called "Chester."[3]

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[1] Ditcham *v.* Chivis, 4 Bing. R. 706.

[2] Woodward *v.* Booth, 7 B. & Cress. R. 301.

[3] Ibid. This, and the other cases which have been cited, show that a trifling variance as to the description of the *termini*, or one not calculated to mislead, is immaterial. The general rule, indeed, in respect to variance, as was stated by Bayley, J., in Wicks *v.* Gordon, 2 B. & Ald. R. 335, is, that a contract must be stated according to its *legal operation*, and if the evidence proves it according to that legal operation, it is sufficient. In Burbidge *v.* Jakes, 1 B. & Pull. R. 225, the declaration stated, that the

§ 450. An averment that the defendant so "carelessly and negligently behaved and conducted himself," is a sufficient averment to admit proof of gross negligence;[1] but an allegation that the servants of the defendant negligently "drove, conducted, and managed the coach," is not supported by proof of negligence in sending out an insufficient coach.[2]

9. *Pleading.*

§ 451. The difference between an *action on the case* for a tort against carriers, and an action of *assumpsit*, or an action directly on the contract, is clearly shown by the pleadings; the *general issue* in the former form of action being "not guilty," and in the latter, "non-assumpsit."[3] As most matters of defence against common carriers to actions on the case may be given in evidence under the general issue, it has been considered that it is seldom advisable to resort to a special plea.[4] A plea not consisting of matter of excuse may amount to the general issue without the formality of the words "not guilty." In a declaration in case against the

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plaintiff was possessed of a messuage at Sheerness. At the trial, it was proved that the house stood in the parish of Minster, which is contiguous to Sheerness, and usually goes under that name; the variance was held to be immaterial. The proof, in Drewry *v.* Twiss, 4 T. R. 558, that the defendant's boat run down the plaintiff's in the half-way reach *in* the Thames, was held to support an allegation, that the boat was run down in the Thames *near* the half-way reach; in an action for negligence. Best, C. J., in Ditcham *v.* Chivis, *ub. sup.*, observed, that he "had no objection, that it should be said of me, that I always entertained a strong impression against deciding on the ground of variance;" but he added, "that impression will never induce me to overturn the law."

[1] Smith *v.* Horne, 8 Taunt. R. 144. See *ante*, § 38, *et seq.*

[2] Mayor *v.* Humphries, 1 C. & Payne. R. 251.

[3] 1 Chitt. Pl. 89, 122; 2 Ib. 332; Zell *v.* Arnold, 2 Penn. R. 292; M'Call *v.* Forsyth, 4 Watts & S. (Penn.) R. 179.

[4] See opinion of Cowen, J., in Hoyt *v.* Allen, 2 Hill, (N. Y.) R. 322.

Grand Junction Railway Company,[1] for the loss of goods delivered to them as common carriers, to be safely and securely carried and conveyed; it was pleaded that the delivery and receipt of the goods were and happened after 4 Will. 4, c. IV., and that, at the time of such delivery the plaintiff became and was a passenger, by the railway, and that the goods were delivered to be conveyed with him as such passenger, and that no part thereof were articles of clothing of the plaintiff. To this plea there was the general replication *de injuria*. On special demurrer, it was held, that the replication was ill, inasmuch as the plea did not consist of matter of excuse, but amounted to the general issue, being an argumentative traverse, that the goods were delivered to the defendants as common carriers.

§ 452. It is not competent, in an action on the case against a carrier, under the plea of "not guilty," to set up as a defence, that the plaintiff misrepresented the weight of the goods which the defendant agreed to carry; the plea operating only as a denial of the loss or damage, and not of the receipt of the goods by the defendant; and the defendant ought to plead the misrepresentation specially, or traverse the acceptance of the goods for the purpose of being carried.[2]

§ 453. The defendant, in the above case, went to trial with an admission that certain goods were put into the carrier's van for the purpose of being safely carried from Maidstone to London, and that he received them for that purpose. At the trial the defendant attempted to set up as a defence, that the plaintiff had misrepresented the weight of the goods, and had put into the van a larger quantity of goods than the defendant was aware of, and, therefore, that the injury was occasioned by the wrongful act of the plaintiff himself. The defendant, it was held, should have pleaded that he was

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[1] Elwell *v.* Grand Junction Railway Company, 5 M. & Welsb. R. 669.
[2] Webb *v.* Page, 6 Scott, New R. 951; 6 Man. & Grang. R. 196.

induced by the misrepresentation of the plaintiff to take a greater load than the van could safely carry; the plaintiff should have notice of the defence on which the defendant means to rely. But in an action on the case for *negligence*, where the plaintiff is contributory to the mischief of which he complains, the defence, under the plea of "not guilty," is admissible.[1]

§ 454. A plea of a *notice* that the carrier would not be responsible, &c., to a count in *trover* in an action on the case has been held bad, as admitting a conversion by inadvertent delivery. The first count in a declaration in an action on the case against carriers, stated a delivery to the defendants at their request, of a *case* containing certain maps to be carried, and alleged a receipt thereof by the defendants, whereby it became their duty to take due and proper care thereof; but that they did not do so, whereby the goods were lost. The second count was in trover. Plea to the first count that, at the time of the delivery of the case and its contents, the defendants were common carriers for hire, and then *gave notice* to the plaintiff, who then had notice and knowledge, that the defendants would not be responsible for the loss of, or damage done to, certain goods and chattels, delivered to them for the purpose of carriage, and amongst others, maps in packages or otherwise, unless the same were insured according to their value, and paid for at the time of delivery; that the said case was the package in which the said maps were contained; that they received the case and maps to be carried as aforesaid, upon the terms and conditions of the said notice, and upon no other terms whatsoever, of which the plaintiffs at the time of the delivery had notice, and that the maps at the time of the delivery were not insured according to their value, or paid for. To the count in trover there was a similar plea, alleging the conversion to have been

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[1] Holding *v.* Liverpool Gas Co. 15 Law Journ. (N. S.) 301, and 10 Jur. 883.

by a mis-delivery, through mistake and inadvertence. On special demurrer to both pleas, it was held, first, that the action being founded on a breach of duty *ex contractu*, the allegation in the pleas of a special contract was sufficient; and that, as the defendants accepted the goods only on the terms of the notice, a special averment of the plaintiff's consent was unnecessary. Secondly, that the third plea was not an argumentative traverse of the facts in the declaration, from which the breach of duty was implied. Thirdly, that as the declaration might apply to any kind of negligence, it was not necessary to allege in the third plea, that the loss was occasioned by such negligence as the defendants were not responsible for; and that if the defendants had committed negligence for which they were liable, notwithstanding their notice, the plaintiff should have now assigned. Fourthly, that the *case* was not separable from the maps. Fifthly, that the plea to the count in trover could not be supported, inasmuch as it admitted a conversion by inadvertent delivery, and did not show that the inadvertence was such as was protected by the notice. "There is a difficulty," said Parke, B., "in supporting that plea, on the construction which we think ought to be put on the terms of the notice on which the goods were received, for the plea admits a conversion by inadvertent delivery; and does not excuse *that*, since the carrier is not by such notice made irresponsible for every mistake or inadvertent delivery, but only for such as were made without negligence, whether gross or ordinary, and a delivery may be even grossly negligent, which is inadvertent.[1]

§ 455. In actions of *assumpsit*, against carriers and all other bailees for not delivering or not keeping goods safe, or not returning them on request, the plea of "non-assumpsit" will operate as a denial of any contract to the effect alleged in the declaration, and of "such bailment as would raise a promise in law to the effect alleged in the declaration. In Dale *v.*

[1] Wyld *v.* Pickford, 8 M. & Welsb. R. 443.

Hall,[1] the declaration, which was against common carriers by sea, was founded in assumpsit, to which there was the plea of "non-assumpsit."

§ 456. The fact in issue under the plea of "non-assumpsit," is whether any such contract as alleged was made; and the plaintiff must prove that it was, by showing that the defendant made it himself, or, if the captain of a vessel made it, that he was the defendant's agent. A declaration in assumpsit stated, that the defendants *were the owners* of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board a quantity of potatoes, to be safely carried by the defendants, *as owners* of the said vessel, to Liverpool; and in consideration thereof, and of a certain freight, the defendants promised the plaintiff to take proper care and safely carry the said goods as with a breach, that through the defendants' negligence, they were damaged. The ownership of the defendants, it was held, was not admitted by the plea of "non-assumpserunt."[2] In Patton *v.* Magrath et al., in South Carolina,[3] (action of *assumpsit*,) the declaration counted upon a joint contract by the defendants to carry fourteen bales of cotton from Hamburgh to Charleston, in a steamboat, of which the defendant Magrath was owner, and the other defendant Brooks, master; and alleged a loss of the cotton by negligence. The evidence of the contract was a bill of lading, signed by the said Brooks, the master, only. It was held, that the contract was several, and that the defendants were improperly joined.

§ 457. In assumpsit against the defendant as a common carrier to recover the value of goods delivered to him, to be taken care of, and to be safely delivered by him, as such carrier, in his cart, from N. to B., and there safely to be

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[1] Dale *v.* Hall, 1 Wils. R. 282.

[2] Bennion *v.* Davison, 3 M. & Welsb. R. 179.

[3] Patton *v.* Magrath *et al.*, 1 Rice, (S. C.) R. 162.

delivered by him to the plaintiff, but which by negligence were lost; it was pleaded, that when the defendant received the goods, an express condition and agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen, but that he neglected and refused so to do, and by reason whereof, and not by any negligence of the defendant, the goods were lost. It was held, that this plea was bad on special demurrer, as amounting to the general issue.[1]

§ 458. To a declaration on a contract, by a bill of lading, by the master of a vessel, to convey goods from Dublin to London, and to deliver the same at the port of London to the plaintiff or his assigns, a plea, that after the arrival of the vessel at London, the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that before a reasonable time for delivery elapsed, they were destroyed by a fire which broke out there by accident, was held ill. The defendants were responsible both for taking care of the goods at the wharf, and for carrying the goods from the wharf; inasmuch as both these duties formed a part of the same express contract, and are paid for by the same reward; and the master, during the whole of the time while the goods are in his possession, is under the obligation of a common carrier. It is, therefore, obvious, the plea in question could furnish no answer to the loss of the goods by fire at the wharf; a common carrier by the well known rule of law, being liable for every loss (not specially excepted) except the act of God and the public enemy.[2]

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[1] Brind *v.* Dale, 2 M. & Welsb. 775.

[2] Gatliffe *v.* Bourne, 4 Bing. New R. 314, and see the case cited more fully, *ante*, § 299.

§ 459. In assumpsit upon an undertaking to carry goods in the defendant's ship to Canton, and to deliver them to the plaintiff's agent there, it was pleaded, that the ship proceeded near the port of Canton, but was prevented by the chief superintendent of trade, and the commander of the naval forces there, from entering that port. This plea, on special demurrer, was held bad, for not sufficiently disclosing that those officers had authority to act in the manner alleged; the authority should have been stated on the face of the plea.[1]

§ 460. Whether the form of action against carriers be considered as founded in contract or in tort, the remedy by action on the case or assumpsit, still falls within the general class of actions, which, in the *statute of limitations*, are called "actions upon the case," and must, therefore, be prosecuted within the period prescribed from the time the cause of action accrued.[2] The pleas of the statute in assumpsit are *non assumpsit infra sex annos*, and *actio non accrevit infra*, &c.; the latter being considered the preferable mode of pleading the statute in assumpsit; as it also is to be preferred to the plea of "not guilty within six years," if the action is an action on the case for a tort; as the action may be for the consequences of the act originating the tort. Although it may be held, that the cause of action arises immediately on the default, yet there may be sometimes an uncertainty in respect to the precise time at which the default should be fixed.

10. *Evidence.*

§ 461. We have seen, that in an action against carriers for negligence or improper conduct, in respect of the carriage of goods, the declaration is founded in tort for a breach of duty, or in assumpsit for breach of contract; and it is necessary to

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[1] Evans *v.* Hutton, 4 M. & Grang. R. 954.

[2] Jeremy on Carr. 133; Angell on Limit. 73.

prove in either case, 1st, a *contract* implied or expressed; 2dly, the *delivery* of the goods;[1] and 3dly, the defendant's *breach of duty* or *promise*.[2]

§ 462. *First*, the action is founded either on an implied contract, or upon an express and special contract. It has already appeared, that where the latter sort of contract exists, it must be relied on and proved, as it cannot be implied.[3] It is usual for the plaintiff to rely on an implied contract, when by evidence it appears that the defendant is a *common* carrier, as alleged in the declaration;[4] for if he is a common carrier, the law supplies the proof of the contract so far as respects the extent and degree of his liability.[5] As to the evidence necessary to show that a person is a common carrier, there is no occasion to recapitulate the much that has already been offered in a former chapter, in respect to what must appear, in order to subject a person to the responsibility of one acting in that capacity.[6]

§ 463. Evidence, that at the door of a booking-office, there is a board on which is painted, "conveyances to all parts of the world," and a list of names and places, is not sufficient proof, of itself, that the owner of the office is a common carrier, so as to charge him for the loss of a box which was booked there; and he cannot be declared against as carrier. Lord Tenterden, C. J., said: "We know there are in this town (London) booking-offices that do not belong to the carriers; and I am of opinion, that you cannot convert the keeper of a booking-office into a carrier." The plaintiff wished to go on the count, he had in his declaration in trover, but it being proved, on the part of the booking-office keeper, that his porter delivered the box in question in due course to one H., who was a Windsor carrier, the plaintiff

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1 See *ante*, Chap. V.
2 2 Stark. Ev. 331.
3 *Ante*, § 441, *et seq.*
4 See *ante*, § 429.
5 2 Greenl. Ev. 210.
6 *Ante*, Chap. IV.

was non-suited.[1] But if it be proved, that a carrier gave directions to have goods sent to a particular booking-office, he is then responsible for the negligence of the office keeper.[2]

§ 464. If the defendant is not a common carrier, it is necessary to prove what the terms of the defendant's undertaking were;[3] and by the terms of his undertaking, he may put himself into the situation of, and incur the responsibility of, a common carrier, as by his *special warranty*.[4] A carrier's receipt for goods is of course evidence of a contract between him and the owner;[5] and the substance of a *bill of lading* is a formal acknowledgment of the receipt of goods, and an express engagement to deliver to the consignee, or his assigns.[6] In a declaration in assumpsit against a common carrier by water, for the non-delivery of a certain quantity of salt and steel which he had received to transport; it was held, that a bill of lading in which the defendant acknowledged the receipt, not only of the salt and steel, but also of certain other articles, was not objectionable as evidence on the ground of variance.[7]

§ 465. *Secondly*, of *delivery*. The responsibility of a carrier attaches upon the delivery to him of the goods to be forwarded, and if accepted, without evidence of any special agreement as to reward. What is sufficient evidence of a delivery and the consequent responsibility, has already been considered;[8] and it has appeared, that it is sufficient to prove

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[1] Upston *v.* Slark, 2 C. & Payne, R. 598; and see Newborn *v.* Just, Ib. 76; Gilbert *v.* Dale, 1 Nev. & P. R. 22; and see *ante*, § 69.

[2] *Ante*, § 135.

[3] 2 Stark. Ev. 332; and *ante*, § 59, 60.

[4] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 417, the facts in which are given in detail, *ante*, § 59.

[5] Samuel *v.* Darch, 2 Stark. R. 60.

[6] *Ante*, § 223–232, 398, *et seq.*

[7] Wallace *v.* Vigus, 4 Black. (Ind.) R 260.

[8] *Ante*, Chap. V.

a delivery to a *duly authorized* agent of the carrier, as, to the master of a vessel, or, to one driving the coach or wagon on the course of conveyance.[1] It is sufficient for the plaintiff to show, that a parcel was delivered to a person and at a house where parcels were being in the habit of being left for the carrier; and the person who so left the parcel may be asked on cross-examination, in an action for the loss, what direction was on the parcel.[2] In order to show a delivery, notice should be given to the defendant to produce his book of entries and way-bill, if any; and he should also prove what orders were given at the time of delivery, as to the carriage of the goods, and the direction written upon the box or package.[3]

§ 466. If it be proved, that one common carrier has received goods from another carrier, to whom they were at first delivered by the owner for carriage, *he* may become liable to the owner as common carrier. Where A. agreed with B., a common carrier, for the carriage of goods, and B., without A.'s directions, agreed for the carriage with C., who, without A.'s knowledge, agreed with D., a third carrier; it was held, that A. might maintain an action against D. for not delivering the goods; and that by bringing the action, A. affirmed the contract made with D. by C., and could not afterwards recover from B.[4] Where it appeared that the goods were delivered to an *express* forwarder, and that he delivered them over to a steamboat company who acted as common carriers, to be transported; this evidence was held to support an action brought directly against the latter, with whom the contract was to be deemed to have been made, through the agency of the express forwarder; the contract with the steamboat company, being ratified by

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1 *Ante*, § 146, 147.

2 Burrell *v.* North, 2 C. & K. R. 680, cited in Lond. Law Mag. for Nov. 1848.

3 2 Stark. Ev. 200; 2 Greenl. Ev. § 213.

4 Sanderson *v.* Lamberton, 6 Binn. (Penn.) R. 129.

the owner of the goods by his bringing the action against them.[1]

§ 467. *Thirdly*, as to *proof of loss.* The letter of a carrier may be used as evidence against him, that the loss was in consequence of his default;[2] and also in proof of the loss, the declaration of the defendant's coachman or driver, in answer to an inquiry made of him for the goods, is competent evidence for the plaintiff.[3]

§ 468. A declaration of the carrier himself, that the property in his custody for conveyance was lost by accident or stolen from him, accompanied with a narration of all the circumstances accompanying the loss, it has been held, ought to be admitted as part of the case, so as to entitle the carrier to the benefit of the statement at the trial, as a part of the *res gestæ.* But it is with the qualification, that the jury is at liberty to disbelieve the statement or to trust to it, according, as in their judgment, the whole circumstances do, or do not, repel the presumption of negligence.[4] The principal points of attention are, whether the declarations, with the circumstances offered in proof, were contemporaneous with the main fact under consideration, and whether they were so connected

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[1] New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. (U. S.) R. 344, and Appx. p. liv.

[2] Cullen *v.* M'Alpine, 2 Stark. R. 552.

[3] 2 Greenl. Ev. § 213; Mahew *v.* Nelson, 6 C. & Payne, R. 58.

[4] Tompkins *v.* Saltmarsh, 14 S. & Rawle, (Penn.) R. 275, cited more fully *ante*, § 40, and see the other cases there referred to. Beardslee *v.* Richardson, 11 Wend. (N. Y.) R. 25. Surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact. Rawson *v.* Haigh, 2 Bing. R. 104; Ridley *v.* Gyde, 9 Ib. 349; Pool *v.* Bridges, 4 Pick. (Mass.) R. 37; Allen *v.* Duncan, 11 Ib. 309; and that a party's own declarations may be given in evidence, if they are a part of the *res gestæ*, see Millikin *v.* Greer, 5 Mississip. R. 429; Postern *v.* Postern, 3 Watts & S. (Penn.) R. 127; Stitt *v.* Wilson, Wright, (Ohio) R. 505; Redder *v.* Spruance, 4 Harring. (Del.) R. 216; *In re v.* Taylor, 9 Paigne, (N. Y.) Ch. R. 611.

as to illustrate its character.[1] It was said by Hosmer, C. J. in Enos *v.* Tuttle,[2] that "declarations, to become a part of the *res gestæ*, must have been made at the time of the act done, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them, as obviously to constitute one transaction."[3]

§ 469. In an action against a carrier for a loss, his agent or servant is not generally a competent witness in his defence. The disqualification of the agent or servant consists in his having a direct interest in the event of the suit; or arising from his liability to his employer, in a subsequent action, to refund the amount of damages which the employer may have paid. This is the well known rule as applicable to the relation of principal and agent, wherever that relation, in its broadest sense, may be found to exist.[4] As, for example, to

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[1] 1 Greenl. Ev. § 108.

[2] Enos *v.* Tuttle, 3 Conn. R. 250.

[3] See opinion of Duncan, J., *ante*, § 40. Against a private carrier charged with the loss of goods by negligence, the common declaration in assumpsit is as follows: — "For that on —— in consideration that the plaintiff at the request of the said (*defendant*) had delivered to him certain goods and chattels, to wit, [here describe them] of the value of ——, to be safely conveyed by him from —— to ——, for certain reward to be paid to the said (*defendant*), he, the said (*defendant*), promised the plaintiff to take good care of said goods, while he had charge of the same, and with due care to convey the same from —— to —— aforesaid, and there safely to deliver the same to the plaintiff, (*or*, to ——, *as the case may be*). Yet the said (*defendant*) did not take due care of said goods while he had charge of the same as aforesaid, nor did he with due care convey and deliver the same as aforesaid; but on the contrary, so carelessly and improperly conducted in regard to said goods, that by reason thereof they became and were wholly lost to the plaintiff." 2 Greenl. Ev. n. (2) to § 210.

[4] It has frequently been held, that where negligence is imputed to the plaintiff's agent, such as if proved, would preclude the plaintiff from recovering, such agent is an incompetent witness for the plaintiff. 1 Stark. Ev. 116; 1 Greenl. Ev. § 394; Thompson *v.* Lothrop, 21 Pick. (Mass.) R. 336.

the case of the captain of a vessel, in an action against the owner of a vessel for deviation or for negligence,[1] or to the case of a pilot, in an action against the owner and captain of a vessel, for mismanagement while the pilot was in charge,[2] or of a guard of a coach, implicated in the like mismanagement, in an action against the proprietor.[3] Neither of such persons are competent, without a release, to give testimony, the direct legal effect of which will be to place themselves in a situation of security against a subsequent action.[4] But factors, brokers, forwarding merchants, &c. are competent witnesses against the carrier, when offered to prove the receipt and delivery of the goods, and other acts within the scope of their employment. The exception to the general rule, that they may testify though interested, is founded in public convenience and necessity; for otherwise affairs of daily and ordinary occurrence could not be proved, and the freedom of trade, and of commercial intercourse would be inconveniently restrained.[5]

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[1] Rothero *v.* Elton, Peake's C. 84; De Symonds *v.* De la Cour, 2 New R. 374. The captain of a canal boat is not a competent witness for the owner, without a release. Humphreys *v.* Reed, 6 Whart. (Penn.) R. 435.

[2] Hawkins *v.* Finlayson, 3 C. & Payne, R. 395.

[3] Whitamore *v.* Waterhouse, 4 C. & Payne, R. 383. In an action for negligently driving a mail-coach against the plaintiff's wagon, his wagoner was held to be incompetent, without a release; although he swore he left sufficient room for the defendant's mail, and although the jury found by their verdict that he was not to blame. Moorish *v.* Foote, 2 Moore, R. 508.

[4] 1 Greenl. Ev. 394; 1 Phillips, Ev. 61; 1 Stark. Ev. 115–118, 3d Lond. edit. There is a distinction between those cases where the judgment will be evidence of the material facts involved in the issue, and those where it will be evidence *only of the amount of damages* recovered, which the defendant may be compelled to pay. 1 Greenl. Ev. 393.

[5] 1 Greenl. Ev. § 476. In Thorne *v.* Hallett, in the Common Pleas (see *Boston Journ. of June* 1, 1849,) the plaintiffs were merchants in Vergennes, Vt.; and they brought their action against the captain of the schooner Henry Curtis to recover the value of a hogshead of sugar lost on the passage from Boston to Troy. The plaintiffs had purchased a large

§ 470. Upon the subject of *burden of proof* in an action against a carrier for negligence, and as to the question upon whom it lies, the rule in respect to *gratuitous* carriers, has already been laid down to be in conformity with the general rule of the law of evidence, viz., that where the allegation is *affirmative* it is sufficient to oppose it by a bare denial, till it is properly established; and that the proposition, though negative in its terms, must also be proved by the party who states it;[1] as where there is a charge against a carrier without hire, of gross negligence, which is in the nature of fraud.[2] But although in actions on the case and of assumpsit, the burden of proof is on the plaintiff to make out his case as he charges it, proof of demand and refusal, or an apparent conversion, in an action of *trover*, will put the defendant on his defence.[3] Wherever non-feasance or negligence is alleged, in an action on contract, the burden of proof is unquestionably on the plaintiff, notwithstanding its negative

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quantity of goods in Boston, including the lost hogshead; and they were properly directed to the care of M. D. Hall, at Troy; and were delivered on board the schooner then bound to Troy. Hall was a forwarding merchant at Troy; and he as well as Flinn, the master of the canal boat which took the rest of the plaintiff's goods from Troy to Vergennes, testified that the hogshead was not received with the other goods from the Henry Curtis. The defendant's counsel objected to the competency of Hall and Flinn to testify, on the ground that they might be liable for the loss of the goods, and they were interested, as their testimony tended to exculpate themselves. But as it appeared that neither of the witnesses had any interest in the canal boat — Hall being a forwarding merchant only, and so not liable as a common carrier; (see *ante*, § 75) — and Flinn being hired by the month, — C. J. Wells ruled, that they were competent witnesses.

[1] See *ante*, Chap. IV.; 1 Greenl. Ev. Chap. III. Where the plaintiff alleges damage in consequence of the defendant's negligence in driving on the highway, the burden of proof is on the plaintiff to show ordinary care on his own part, and want of it on the part of the defendant. Lane *v.* Crombie, 12 Pick. (Mass.) R. 177.

[2] See *ante*, § 37, 38, for the authorities on this subject, and 1 Greenl. Ev. § 80.

[3] *Ante*, § 38, n. 2.

character ;[1] that is, the party making the allegation of loss or non-delivery, must give some evidence in support of the allegation, notwithstanding its negative character.[2] In respect to the carriage of goods *for hire* by persons who are not common carriers, it has appeared, that there are discrepancies in the authorities as to the application of the above rule.[3] In cases which have been cited, it was considered, that the fact of a loss by a carrier for hire, by secret purloining of the goods in his hands, is such *prima facie* evidence of the want of ordinary care, as to compel the defendant to rebut it by proof of ordinary care ; and such is the opinion advanced by Sir William Jones.[4] Where a public conveyance is overturned or breaks down, without any apparent cause, the law will imply negligence, and the burden of proof is on the owners to rebut that legal presumption.[5] And the very occurrence of loss or damage to goods delivered to a private bailee for hire seems to be regarded, of itself, cogent evidence of the want of ordinary care.[6] The reason it is so, and that it is sufficient, if the plaintiff offers such evidence, as in the absence of any counter testimony, affords ground of presuming, that the allegation he makes is true, is, that if proof of the negative were required, the inconvenience would be very great.[7] However, in most cases, the question of negligence is more a question of fact to be determined by the jury, under the particular circumstances, than of law.[8]

§ 471. In an action against carriers for the loss of a parcel,

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1 1 Greenl. Ev. § 81 ; and see *ante*, § 48, n. 2 ; also § 32, 33, 35.

2 2 Greenl. Ev. § 213 ; Tucker *v.* Cracklin, 2 Stark. Ev. 385.

3 See *ante*, § 61, and the authorities there cited.

4 *Ante*, § 48, *et seq.*

5 Ware *v.* Gay, 11 Pick. (Mass.) R. 106.

6 See *ante*, § 50.

7 1 Greenl. Ev. § 78, 79.

8 *Ante*, § 51, and the authorities there referred to, and § 184, *et seq.*

the consignee's shopman, not knowing of the delivery, and believing he must have known it if a delivery had taken place, is *prima facie* evidence of non-delivery. In an action of assumpsit for negligence in carriers in losing a parcel, in which the general issue was pleaded, it appeared that the plaintiff had ordered goods to be sent by the defendants' stage-coach, and the consignor of the goods proved the giving the parcel to the defendants' coachman, and that it was directed to the plaintiff. To show that it never came to hand, the plaintiff's shopman was called, who did not know of the delivery, but believed it could not have been delivered without his knowledge. Hullock, B., considered, that the evidence of non-delivery was sufficient to call on the defendants to prove a delivery by their porter, or some other witness; because the plaintiff could not be expected to prove a non-delivery better than he had done.[1]

§ 472. In respect to a loss by a *common carrier*, the burden of proof is, without any manner of doubt, upon him to show, that the loss was occasioned by the act of God, or the public enemy,[2] though the burden of proof in an action on the case may be on the plaintiff to show, that the property did not safely reach its destination; and yet, in assumpsit, it may be sufficient to prove the delivery of the property to the defendant, and then call upon him to account for it.[3] If

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[1] Griffiths *v.* Lee, 1 C. & Payne, R. 110.

[2] See *ante*, § 202, and Chap. VI. generally. An authority not there cited is the case of King *v.* Shepherd, 3 Story, (Cir. Co.) R. 349. In that case a box of gold sovereigns was shipped, to be carried from New York to Mobile, and the bill of lading only contained the usual exceptions against "perils of the seas," and the ship was wrecked and the money lost. It was held, that the burden of proof was on the master and owners of the ship to show, that the loss occurred by a "peril of the seas;" and that, failing to do this, they were responsible for the loss, however it occurred. And see *ante*, § 188, *et seq.*

[3] Tucker *v.* Cracklin, 2 Stark. R. 385; Day *v.* Ridley, 16 Vermt. R. 48. That the burden of proof may be turned upon the defendant by slight proof, see Griffith *v.* Lee, *ub. sup.*

a cargo weighing a certain weight be delivered to him to be carried, and when the cargo arrives at its destination the weight be deficient, this is evidence from which a jury may infer negligence in the carrier; and if the deficiency did not arise from the negligence of the carrier, it is incumbent on him to show that. It was proved in Hawkes *v.* Smith,[1] that more than sixty-nine tons of bones were put on board the defendant's vessel, and that, at the end of the voyage there were not sixty-nine tons, but a much smaller weight. The defendant pleaded that he took proper care of them, and did carry them safely in a reasonable time; and also that the bones were put on board in a damp state, by reason whereof, and without any default of the defendant, they became decomposed, and the defendant, therefore, could not perform his promise. By Rolfe, B.: "I think that this is evidence from which the jury may infer negligence; and that if there was no negligence on the part of the defendant, he should show that." [2]

§ 473. But where a common carrier has *qualified* his liability as such, by a general *notice* to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, and rates of freight; and it is proved, that such notice is brought home to the knowledge of the employer, he, (the carrier) then descends to the situation of a private carrier for hire, and therefore the burden of proof of negligence falls more upon the employer. But the burden of proof is on the common carrier to show clearly, that the person with whom he deals has been fully informed of the terms of the notice.[3]

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[1] Hawkes *v.* Smith, 1 C. & Marsh. R. 72.

[2] As to loss of goods by decay, leakage, &c., see *ante*, § 210 – 214. See *ante*, § 54, 245, 247, *et seq.*, 267, 268.

§ 474. The law of evidence, in respect to the *value of the goods* lost by a bailee, is of much importance. Where no *fraud* has been proved on the part of a bailee, the presumption as to the precise value will be against the demand of the plaintiff, unless he establishes the precise value, by clear evidence. But if the conduct of the bailee be tinctured with fraud, the presumption will be in favor of the plaintiff's demand. In assumpsit for goods sold by a liquor merchant, and the only proof as to the contents of the bottles delivered being by the plaintiff's servants, who could not speak to the quality of the contents, the jury, in the absence of all fraud, were directed to presume them filled with the cheapest liquor with which the plaintiff dealt.[1] So where the delivery of a bank note was proved, but its denomination not shown, the jury were instructed to presume it to be of the lowest denomination in circulation.[2] In the case of Armory *v.* Delamirie,[3] on the other hand, the presumption of the value of the thing in question, was, on account of fraud in the defendant, in favor of the plaintiff. That case was, — a chimney-sweeper's boy having found a jewel, took it to the defendant, a goldsmith, to know its value. The defendant knocked out the stones, and returned the plaintiff the setting, refusing to give him back the stones. In trover for the value of the stones, Pratt, C. J., directed the jury, that unless the defendant would produce the stones, so as to show they were not of the finest water, they ought to presume against him, and make the value of the best jewels that would fit that setting, the measure of their damages.

§ 475. Supposing the delivery of a box or trunk to a carrier for conveyance, and the loss of it by him to be fully proved, and that no person but the owner has knowledge of the particular contents, the question by what evidence, in

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1 Clunnes *v.* Perrey, 1 Camp. R. 8.

2 Lawton *v.* Sweeney, 8 Jur. 964, cited in 2 Greenl. Ev. § 255.

3 Armory *v.* Delamirie, 1 Str. R. 105.

an action for damages against the carrier, or in an action of trover for the goods, is the quality, quantity, and value of the goods, to be ascertained and estimated by the jury, is one of great practical importance to the community. In Butler *v.* Basing,[1] the action was against the defendant as proprietor of a stage-wagon for the loss of a box, and Garrow, B., in summing up to the jury said: — "With regard to the amount of the damages in case a verdict passes for the plaintiff, it is right that I should tell you that here is no distinct evidence of the contents of the box; however, I should recommend you not to pare down the amount of damages, because the articles contained in it cannot be distinctly proved. It very often happens that persons, more especially those in the station of life in which the plaintiff is, pack their own clothes, and in such cases it must be always impossible to give evidence of the precise contents of the boxes or portmanteaus. I should therefore recommend you, if you find for the plaintiff, to give damages proportioned to the value of the articles which in your judgment you think the box might and did fairly contain."

§ 476. Mr. Bell says: — "The value of the parcel or thing lost may occasion difficulty, unless dispensed with by a general rule. A person cannot always have direct and positive evidence of the sum which may have been in his pocket-book when stolen from an inn; or, of the value of his luggage, taken from a coach. In order to get quit of the difficulty, a very clumsy and dangerous remedy formerly prevailed in Scotland; namely, that the person should, *by his own oath*, be allowed to establish that value against the carrier or innkeeper; it being reserved to the Court to restrain the claim." He further observes: — "I should have no doubt, that reasonable evidence would now be required of the nature and value of the thing lost, fortified

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[1] Butler *v.* Basing, 2 C. & Payne, R. 613.

by the oath of the employer."[1] It is indeed very well known, that, as a general rule, a party is not competent to testify in his own cause; but this general rule, like every other, has its exceptions; and *necessity*, either physical or moral, it has been said, dispenses with the ordinary rules of evidence.[2] This principle of necessity is recognized in England in decisions which have been made on the statute of Winton, in which it is held, that the party robbed is, from necessity, a competent witness to prove the robbery, and of *what sum or things* he was robbed, in support of his own action.[3] It is also laid down, that on a trial at Bodnyr, *coram* Montagu, against a common carrier, a question arose about the things in a box, and he declared, that this was one of those cases where the party, himself, might be a witness *ex necessitate rei;* for, every one did not show what was put in his box.[4]

§ 476 *a.* The principle that necessity dispenses with the ordinary rules of evidence has been recognized in Pennsylvania, in an action to recover the value of the contents of a trunk lost from a stage-coach, and the plaintiff was held to be a competent witness to prove the contents, and the value of the articles composing them; and, in giving the judgment of the Court in this case, Gibson, C. J., said: — "On the ground of necessity, the plaintiff was competent not only to specify the articles contained in the trunk, but to prove the value of them. Book entries by the parties' own hand are evidence, not only of sale and delivery, but also of price, which is a part of the contract. Originally such entries were

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[1] 1 Bell, Comm. 379, 380.

[2] Per Rogers, J., in Clark *v.* Spence, 10 Watts, (Penn.) R. 335; and see 1 Greenl. Ev. § 348. As to the testimony of witnesses who are interested, being admitted *ex necessitate*, in the Admiralty, see *post*, § 670.

[3] Rolle, Abr. 685, 686, cited in Herman *v.* Drinkwater, 1 Greenl. (Me.) R. 27.

[4] 12 Vin. 24, pl. 32.

allowed to prove, perhaps, no more than delivery; but experience induced the Courts to go further. Yet the value of merchandise, bearing, as it does, a determinate price in the market, might be more readily estimated from description, than the more uncertain value of clothing in every degree of wear, which the owner would be better able to estimate than a disinterested witness, who must, after all, found his judgment on the description which the owner may choose to give. Why trust to his data and not to his estimate? It is as easy to give a false description as to overrate the value."[1]

§ 477. In Herman *v.* Drinkwater, a shipmaster, having received a trunk of goods on board his vessel, to be carried to another port, which on the passage he broke open and rifled of its contents; the owner of the contents, proving the delivery of the trunk and its violation, was admitted a witness, in an action of trover for the goods against the shipmaster, to testify to the particular contents of the trunk; there being no other evidence of the fact to be obtained. The case was, however, an aggravated case, and exhibited conduct of great moral turpitude on the part of the defendant. The plaintiff was an unsuspecting foreigner, ignorant of the language of the United States, to which country the defendant belonged. Having invested his property in certain articles of small bulk, he shipped them, packed in a trunk, on board the brig of which the defendant was master, then in the port of London, who undertook to transport them to New York. He also engaged a passage for himself in the same vessel to accompany his goods, and sent on board his clothes and other baggage necessary for his personal accommodation; but the defendant, indifferent as to the interest of the stranger, sailed without him; and, on the passage he violated the trunk, presented a part of the contents to his mate and crew, but kept the more valuable himself; profess-

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[1] Whitesell *v.* Crune, 8 Watts & S. (Penn.) R. 369.

edly, because he might be held responsible at a future day. Instead of sailing for New York, he sailed for, and arrived at, Portland; and at the latter place disposed of a part of his plunder. In the mean time the plaintiff took passage in another vessel, and arrived at New York, where, not hearing of the defendant, he wrote to Portland where the vessel was owned. His correspondent applied to the defendant, who denied ever having received the goods; and it was not until certain of the articles sold in Portland were identified beyond all question, by the particular description which the plaintiff had furnished, under oath, of the contents of the trunk, that the fact was established, that the defendant had received and embezzled the property. To prove the particular contents, the Judge who presided at the trial, admitted the deposition or affidavit of the plaintiff, *upon the ground of necessity;* he not having it in his power to establish the fact by other proof. The testimony was objected to on the part of the defendant, and a new trial granted. Weston, J., in giving the opinion of the Court, said: — "In the case before us, the plaintiff had sustained his action by proof not liable to objection; but the extent of the damages to which he was entitled could be ascertained only by his own testimony. As he was to accompany the goods himself, it is not to be presumed that he took any bill of lading or receipt from the defendant; and if he had, such an instrument does not usually specify the particular contents of trunks and packages. The plaintiff, therefore, unless his oath is admitted, must be deprived of an adequate remedy; although the justice of his claim is most apparent. The analogy between his case and that of the party robbed, in an action under the statute of Winton, is very striking; and his testimony is strongly corroborated by circumstances. Upon the whole, we are all of opinion, that the deposition or affidavit of the plaintiff was rightly admitted, upon the ground of necessity." [1]

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[1] Herman *v.* Drinkwater, 1 Greenl. (Me.) R. 27. The defendant in this case was clearly guilty of a *felony*. A servant is guilty of felony in

§ 478. In the case given in the preceding section, the defendant had committed a *gross fraud*, and the party's own oath was allowed as evidence, *in odium spoliatoris*.[1] But it

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stealing his master's goods, although he has the custody of them for a particular purpose. East, P. C. 554, and 2 Stark. Ev. (3d Lond. edit.) § 10. So where a butler steals his master's plate. East, P. C., and 2 Stark. *supra*. So if the servant has the goods for a specific purpose, as where money had been delivered to a servant to be delivered to a third person, and he spent a part, and embezzled the rest. Rex *v.* Lavenden, East, C. P. 566. So where a carter went away with his master's cart, it was held, that he was guilty of felony. Robinson's case, East, P. C. 565. Where a porter was sent by his master with goods to be delivered to a customer, and he broke open the parcel and sold them, it was held to be a felony. Rex *v.* Bass, Leech, 285, and 2 Stark. *sup.*; and this is precisely the case of Herman *v.* Drinkwater, cited above. But in all cases where the party has a legal possession of the property distinct from that of the owner, he is not guilty of felony in appropriating the goods, unless the possession be obtained with a felonious intent to steal the goods, for then the party acquires no legal possession against the owner, for the law will not permit him to take advantage of his own wrong; and in point of law no contract exists. 2 Stark. Ev. *sup.* The circumstances may be such, that the fact of selling the goods, is *primâ facie* evidence of an original felonious intent. If a carrier unpacks the goods, the very act itself determines the trust possession, and the subsequent taking is felonious, for the thing committed to his trust is single and entire. 21 H. 8, pl. 14; 1 Hawk. c. 33, § 5.

[1] Mr. Greenleaf says: "To the general rule, in regard to parties, there are some *exceptions*, in which the *party's own oath* may be received as competent testimony. One class of these exceptions, namely, that in which the oath *in litem* is received, has long been familiar in Courts administering remedial justice according to the course of the Roman Law, though in the Common Law tribunals its use has been less frequent and more restricted. The oath *in litem* is admitted in two classes of cases; first, where it has been already proved, that the party against whom it is offered has been guilty of some *fraud*, or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages; and secondly, where, on general grounds of public policy, it is deemed essential to the purposes of justice. An example of the former class is given in the case of the bailiffs, who, in the service of an execution, having discovered a sum of money secretly hidden in a wall, took it away and embezzled it, and did great spoil to the debtor's goods; for which they were holden not only to refund the money,

has been held, that a bailor, though a plaintiff, may be a competent witness to prove the particular contents of a trunk, lost not by the carrier's fraud, but through his *negligence;* that is, *if a foundation be first laid* for the party's oath down to the period to which the party is to speak; as by proving the delivery of the trunk to the carrier, and the loss of it by his negligence.[1] Yet it is proper, that the admission of such testimony should be limited to clothing and personal ornaments. In Pudor *v.* Boston and Maine Railroad Co.[2] the plaintiff had laid the foundation of his action by proving that he had delivered to the company a box to be carried to a certain place; that the box was not delivered by the carrier; that he had made a demand thereof; and that the defendant admitted its loss. He then offered to show, by his own testimony, (it not appearing that he had any other means of showing it) what was in the box, and the value of the articles; but as the declaration alleged, that the box contained medical books, medicines, surgical instruments, and chemical apparatus, it was held that the party's oath was inadmissible; and judgment was rendered for him only for the value of the box.

§ 478 *a.* In the case of Clark *v.* Spence, in Pennsylvania, it was agreed, that the party may by his own oath prove the clothes, and even the personal ornaments contained in the

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but to make good such other damage as the plaintiff would swear he had sustained. Childrens *v.* Saxby, 1 Vern. R. 207; 1 Eq. Ca. Ab. 299, S. C. So, where a man ran away with a casket of jewels, he was ordered to answer in equity, and the injured party's oath was allowed as evidence, *in odium spoliatoris.* Anon. in E. Ind. Co. *v.* Evans, 1 Vern. R. 308." 1 Greenl. Ev. § 348. Mr. Greenleaf then adds, that the rule is the same at Law, and he cites Herman *v.* Drinkwater, *ub. sup.*, and refers to Sneider *v.* Geiss, 1 Yeates, (Penn.) R. 34.

[1] Clark *v.* Spence, 10 Watts, (Penn.) R. 335; Bingham *v.* Rogers, 6 Watts & S. (Penn.) R. 495; McGill *v.* Rowand, 3 Barr. (Penn.) R. 342, 451; and 1 Greenl. Ev. § 348, 349.

[2] Pudor *v.* Boston and Maine Railroad Co. 13 Shep. (Me.) R. 458.

trunk containing the clothing of a passenger.[1] But where these clothes are set at a very high value, or the ornaments are very numerous and estimated at high prices, it may be necessary to require some proof, that the party alleging the loss actually possessed such articles of such price when at home, and neither sold them nor left them at home, or the place of his or her last residence.[2] If the plaintiff must in every other instance prove his case by legal evidence, Courts should be careful not to extend the exception beyond its legitimate limits. It is admitted from necessity, and perhaps on a principle of convenience, because every one does not show what he puts in a box; and it applies with great force to wearing apparel, and to every article which is necessary or convenient to the traveller, which in most cases are packed by the party himself, or his wife, and which, therefore, would admit of no other proof. A lady's jewelry would come within this class, and it is easier to conceive than to enumerate other articles which come within the same category. But it must not be understood, that such proof can be admitted, merely because no other evidence of the fact can be obtained; for, if a *merchant*, sending goods to his correspondent, chooses to pack them himself, his omission to furnish himself with the ordinary proof, is no reason for dispensing with the rule of evidence which requires disinterested testimony. Such omission is not of the usual course of business, and there must be something peculiar and extraordinary in the circumstances of the case, which would justify the Court in admitting the oath of the party.[3]

§ 479. The principle of *necessity* which, in Pennsylvania, enables a party, under particular circumstances, to be a witness, to prove the contents of a lost trunk or box, applies with as much, if not greater force, to the *wife* as well as to

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[1] Clark *v.* Spence, *ub. sup.*

[2] Bingham *v.* Rogers, *ub. sup.*

[3] Clark *v.* Spence, *ub. sup.*

the *husband.* Either may be admitted to prove the quantity and value of the wearing apparel belonging to each, (including in the catalogue the wife's jewelry, and every other article pertaining to her wardrobe,) that may be necessary or convenient to either in travelling. The wife *usually* packs her husband's trunk, and always her own, and therefore, to say she cannot, in a proper case, be a witness, would amount almost to a repeal of the rule, and in most cases to a denial of justice.[1]

§ 480. In actions under the statute of Winton before mentioned, the loss was by *robbery*, and the action in the before mentioned case of Herman *v.* Drinkwater, there was a tortious or *fraudulent* taking away; but where there is a loss not happening by robbery or fraud, and the case is simply a case of *negligence* in the carrier, it has been held, (contrary to the decisions above referred to in Pennsylvania, by the Supreme Court of Massachusetts,) that such a case is not brought within any exception to the general Common Law rule of evidence; and that Court have been of opinion, that to admit the plaintiff's oath in cases of the last mentioned nature would lead to much greater mischiefs, in the temptation to frauds and perjuries, than can arise from excluding it. In an action against a railroad company to recover damages for the loss of a trunk, the Court accordingly decided, that the plaintiff was not a competent witness to prove the contents of the trunk, although he had no other evidence. In giving the opinion of the Court, Hubbard, J.

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[1] Per Rogers, J., in delivering the opinion of the Court in McGill *v.* Rowand, 3 Barr. (Penn.) R. 451. The evidence of the plaintiff's wife in this case was admitted, as to the list of the articles in her own and her husband's trunk; and also the evidence of the husband as to the list of articles in his own trunk, with the values annexed. In the catalogue testified to and valued by the wife, were a valuable diamond breast-pin, a gold breast-pin, and a miniature set in gold, with chain.

remarked as follows: "If the party about to travel places valuable articles in his trunk, he should put them under the special charge of the carrier, with a statement of what they are, and of their value, or provide other evidence, beforehand, of the articles taken by him. If he omits to do this, he then takes the chance of loss, as to the value of the articles, and is guilty, in a degree, of negligence — the very thing with which he attempts to charge the carrier. Occasional evils only have occurred, from such losses, through failure of proof; the relation of carriers to the party being such, that the losses are usually adjusted by compromise. And there is nothing to lead us to innovate on the existing rules of evidence. No new case is presented; no facts which have not repeatedly occurred; no new combination of circumstances." [1]

§ 481. The difficulty in respect to restricting the quantity or value of the articles that may be deemed proper or useful, as a traveller's baggage, for his or her ordinary purposes, is admitted in Pennsylvania. The subject, it is there considered, is susceptible of no precise or definite rule; but it is held, that when there is an attempt to abuse the privilege in question, it is to be left to the intelligence and integrity of the jury to apply the proper corrective.[2] The naked question in David *v.* Moore,[3] was whether the plaintiff was a competent witness to prove that he had *money* (the sum of $75) in his trunk, which was cut from the stage-coach of the defendants, in which the plaintiff was a passenger; and it was held, that he was not.[4]

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[1] Snow *v.* Eastern Railroad Company, 12 Met. (Mass.) R. 44. The trunk in question contained wearing apparel, books, and twenty-five dollars in money.

[2] McGill *v.* Rowand, 3 Barr, (Penn.) R. 342, 451.

[3] David *v.* Moore, 2 Watts & S. (Penn.) R. 230.

[4] See *ante*, § 115, 116.

11. *Damages.*

§ 482. The amount of damages to be recovered where goods are intrusted to a carrier, and they are not delivered according to his undertaking, depends upon his liability being established, either to answer for the whole value, or only to the extent to which he has succeeded in limiting his responsibility by *notice.* The general rule, in the former case, is, that the *value of the goods* is the measure of damages.[1] But, as Mr. Sedgwick says, the question at once arises, whether that value is to be computed at the place where delivered to the carrier, or at the place of destination. It seems, says that author, to be well settled, that the measure of damages, is the value of the goods at the latter place; and that this sometimes involves an inquiry into foreign markets, and will generally include the profits of the adventure; and that it has been rightly held, that nothing less will satisfy the contract.[2] The principle, as to the obligation of the carrier to respond conformably to the measure of damages thus stated, is happily illustrated by C. J. Tilghman, in giving the opinion of the Court, in Gillingham *v.* Dempsey:[3] "If we consider it," says he, "upon principle, the damage to the plaintiff is the loss he has suffered by the non-delivery of his goods at the place of destination, and that loss is the net price which the goods would have brought at that place. In insurance, the law is so well known, that the merchant who wishes to cover himself to the amount of his goods at the port of destination may do so, by valuing them in the policy accordingly, or by a special insurance on *profits.* But this is never done in contracts for carriage — an argument of some weight, that it has been supposed the plaintiff may recover according

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[1] Sedgwick on Meas. of Dam. 370; Ludwig *v.* Meyre, 5 Watts & S. (Penn.) R. 435; Hand *v.* Baynes, 4 Whart. (Penn.) R. 204.

[2] Sedgwick, *ub. sup.*

[3] Gillingham *v.* Dempsey, 12 S. & Rawle, (Penn.) R. 188.

to the value at the port of destination. Then, if we consider the policy which should regulate these contracts, it is best to remove from the carrier all temptation to fraud, which will be best done by making himself answerable for the value at the port of *delivery*. If the goods should be of increased value at the place of delivery, as they generally are, and the liability extends no farther than the value at the place of *shipment*, there is very great temptation to fraud; and it will be extremely difficult for the plaintiff to prove, whether the loss happened by fraud, negligence, or unavoidable accident." The learned Judge said in addition: — "It would require very strong authority to satisfy me, that where the carrier fraudulently disposed of the goods at the place of delivery, and made great profit thereby, he, or his principal, should be responsible for no more than the value at the place where he received them. It may be said, that in such case the carrier himself, if the fraud could be proved, would be liable in an action of trover, for damages, to the full amount of what he made by his fraud. But that involves the plaintiff in the difficulty of proving the fraud, and besides, the carrier himself is often worth nothing, and his principal the only person looked to, would not be answerable in trover." Such seems clearly to be the doctrine in England.[1]

§ 483. The above case of Gillingham *v.* Dempsey was an action on a bill of lading against T. D. by which he engaged to carry certain crates of earthen ware belonging to the plaintiff, from the port of Liverpool to the port of Philadelphia, and it appeared, that, in consequence of not stowing them properly, some of the crates were crushed by the weight of those above. The jury found a verdict for the plaintiff,

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[1] In an action of assumpsit against the defendants as owners of the Helena, for not delivering a cargo of wheat shipped to the plaintiffs, the cargo reached the port of discharge, but was not delivered, and the price of the cargo at the time it reached its port of destination, was held to be the rule of damages. Brandt *v.* Bowlby, 2 B. & Adol. R. 932.

subject to the opinion of the Court, on a point reserved, namely, whether the loss of the plaintiff was to be estimated at the first cost of the article, at the port of embarkation, or at the market price at the time of delivery at the port of destination. It was held, (C. J. Tilghman delivering the opinion of the Court,) that the measure of damages was the net value of the goods at the port of destination.[1] In a more recent case in Pennsylvania, it was held, that the measure of damages is the value of the article lost, at the place to which it is consigned.[2] In O'Connor *v.* Foster, in the same State,[3] in an action for a breach of contract to carry wheat from Pittsburg to Philadelphia, the difference between the value of the wheat at Pittsburg, with the freight added, and the market price at Philadelphia, at the time it would have arrived there, if carried according to contract, was held to be the measure of damages. There was no reason, the Court asserted, why carriers, who engage with merchants to transport merchandise, should not be held to a strict performance of their engagements; and that this is to be done by obliging them to indemnify the shippers fully.

§ 484. In New York, where a suit was brought on an agreement to carry a quantity of salt from Oswego to Queenstown, the difference in value of the article at Oswego and at Queenstown at the time, was held the true rule of damages.[4] The same rule was laid down in New York in an action against the master of a vessel where the goods had been embezzled on the voyage, without fraud on the part of the defendant; and, in this case, the Court held the following language in respect to *interest:* — "The question of interest depends on circumstances. The jury may give interest by way of damages, in cases in which the conduct of

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1 Gillingham *v.* Dempsey, *ub. sup.*

2 Warden *v.* Greer, 6 Watts, (Penn.) R. 424.

3 O'Connor *v.* Foster, 10 Watts, (Penn.) R. 418.

4 Bracket *v.* McNair, 14 Johns. (N. Y.) R. 170.

the master was improper. But here no bad conduct is to be imputed to him; and interest is not, in every case, and of course, recoverable, because the amount of the loss is unliquidated, and sound in damages to be assessed by the jury." [1]

§ 485. Where the defendant contracted to carry fifty tons of the plaintiff's hay to a distant port for sale, the hay to be delivered at the ship's side, and after receiving twenty-four tons on board, declined taking any more, because the ship was full, it was held, that it was not necessary for the plaintiff, after this refusal, to tender the residue of the hay at the ship's side, in order to entitle himself to damages; and that the rule of damages, was the difference between what the plaintiff in fact received, or with due diligence and prudence might have obtained for the hay left in his hands, and the price at the port of destination, deducting freight and expenses.[2]

§ 486. Where a libel in the Admiralty was filed against a vessel for the non-delivery by the master of a cargo at Velasco, it appeared, that the vessel arrived out, and that, the consignee refusing to receive it, the master, contrary to his duty, carried it on to New Orleans. It was held, that the libellants were entitled to recover the actual value at Velasco, at the time when the cargo should have been landed

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[1] Watkinson *v.* Laughton, 8 Johns. (N. Y.) R. 213. The same rule with the same modification in respect to interest, was laid down in Amory *v.* McGregor, 15 Johns. (N. Y.) R. 24. The defendant, a common carrier, had undertaken to carry by water certain merchandise from Cincinnati to Tiptonsport, on the Wabash river; the measure of damages was held to be the wholesale value of the merchandise at the place to which they were to be carried, deducting the price of freight. Wallace *v.* Vigus, 4 Black. (Ind.) R. 260. The rule was held to be the same in Ohio in McGregor *v.* Kilgore, 6 Ohio R. 143.

[2] Nourse *v.* Snow, 6 Greenl. (Me.) R. 208.

there, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed. Mr. J. Story, in this case, said, that the rule adopted in prize cases, of an addition of ten per cent. to the price cost of the cargo, did not apply to cases like this; that rule ordinarily supposing, that the vessel has been captured before she arrived at the port of destination, and the Court making the presumption of the additional value of ten per cent. *in odium spoliatoris*.[1]

§ 487. The case of Bridge *v.* Austin, in Massachusetts, was decided upon its own peculiar circumstances. It was an action against the defendant for receiving the plaintiff's goods as his bailiff, and taking on himself to carry them safely from Boston to Charleston, in South Carolina. The defendant engaged to dispose of them, at Charleston, on account of the plaintiff, and pay him the proceeds, and expressly took upon him all risks, except those of the sea, and was to have a commission of *five per cent.* It was also an important circumstance, that the goods (a box of linens) were declared in the defendant's written receipt and engagement, *to amount to the sterling cost* of eighty-four pounds, six shillings and one farthing. The linens arrived safe, and were delivered by the captain to the defendant at Charleston, where they were stolen, without his fault, before he had an opportunity of selling them. He was held to be liable according to their value at Boston, deducting *five per cent.* commission. In this case the defendant was supercargo, and his engagement seems to have been in the nature of an *insurance in a valued policy*.[2]

§ 488. As it respects the mode in which the value of the

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[1] Arthur *v.* Schooner Cassius, 2 Story, (Cir. Co.) R. 81.

[2] Bridge *v.* Austin, 4 Mass. R. 115, and comment on the decision by C. J. Tilghman in Gillingham *v.* Dempsey, 12 S. & Rawle, (Penn.) R. 187.

article is to be arrived at, the fair test of its value, and consequently of its loss to the owner, (assuming that there is no defect in the quality,) is its price *at the time* in the market. Thus, in an action against a common carrier for negligently transporting *mulberry trees* of the Alpine species, the market value of the trees at the time, however fictitious, was held the standard of damages; and that the range of prices in the entire market, and the average thus found, was the test, and not any sudden inflation.[1]

§ 489. Where a box of gold sovereigns was shipped to be carried for hire from New York to Mobile, and the vessel was wrecked on the "Hondu Reefs," and the box was lost, in a libel in the Admiralty to recover its value against the captain and owners, the libellants asked to have the value of the sovereigns allowed them as if the coin had arrived at Mobile. But it was held, that, as the sovereigns were not carried to Mobile, and might never have arrived there, the true test was their value at Key West, with interest upon the value from the time when proceedings for salvage were instituted at Key West. That date was adopted as allowing the captain full time, to have ascertained all the facts which were within the reach of an interested and vigilant master and owner.[2]

§ 490. In case of the acceptance of the goods short of the place of destination, that is no bar to an action for damages which before arose from the carrier's negligence; but the acceptance may be given in evidence in mitigation of damages, so as to limit the recovery to the actual loss sustained by the owner.[3]

§ 490 *a*. For a non-delivery of goods within a *reasonable*

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[1] Smith *v*. Griffith, 3 Hill, (N. Y.) R. 333.

[2] King *v*. Shepherd, 3 Story, (Cir. Co.) R. 349.

[3] Bowman *v*. Teall, 23 Wend. (N. Y.) R. 306; and see *ante*, § 333.

time, the carrier of them is only responsible for reasonable consequences of his breach of contract. Thus, where the plaintiff sent certain goods by the defendants, who were carriers, to be delivered at a particular place on a particular day, so as to be ready for market on another particular day, but did not give notice they were sent for that purpose; and on that day the plaintiff's clerk went there, and owing to the non-delivery of the goods in season, he removed them to another place for sale; it was held, in an action for the non-delivery of the goods in a reasonable time, that the expenses so incurred might be given by the jury in damages. Whether the expenses, in such case, are reasonable or not, is entirely a question for the jury.[1] If goods are injured in their transit from A. to B., or, if, after their arrival at the latter place, and before storage; the measure of damages, of course, is the difference between the value of the goods when delivered to the carrier, and the value of them in their damaged condition, when received by the consignee at B.[2]

12. *The Parties to sue.*

§ 491. The general rule of law in respect to all actions is, that the action should be brought in the name of the person whose legal right has been affected; a rule necessary to be observed, in order that the party suing shall not be compelled to abandon his suit after having incurred great expense.[3] This general rule renders it important, before commencing an action against a carrier for his negligence or default in the conveyance of goods, to be particular in ascertaining in whom the property in the goods is vested; for, by assumption of law, he is the person who sustains the loss, and therefore, unless such inference of law is contradicted by the particular facts of the case, he is the party to demand compensation

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[1] Black *v.* Baxendale, 1 Welsb. Hurlst. & Gordon, R. 401, Exch.

[2] McHenry *v.* Railroad Company, 4 Harring. (Del.) R. 448.

[3] See 1 Chitt. Pl. 1, *et seq.*

from him by whom he has been injured. There may be a special property in a third person, or a special contract between the consignor of goods and the carrier, which will rebut the presumption referred to ;[1] but otherwise the action must be brought in the name of the owner of the property. Thus, if a father send a present to his child by a carrier, and it is lost, the father cannot maintain an action as owner; but the action must be brought in the name of the child.[2]

§ 492. In general a mere servant or agent with whom a contract is made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon ; but if he has a beneficial interest in the performance of the contract, or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract, as in the case of a factor, or broker, or a warehouseman,[3] or carrier,[4] or captain of a ship for freight.[5] An agent in England, shipping goods to the for-

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[1] Freeman *v.* Birch, 1 Nev. & Man. R. 426 ; and see opinion of Gibson, J., in Griffith *v.* Ingledew, 6 S. & Rawle, (Penn.) R. 429 ; and the point stated will be more fully explained, *post.*

[2] 2 Steph. N. P. 990. In Hunter *v.* Westbrook, 2 C. & Payne, R. 578, a father gave his son a watch, and several articles of wearing apparel : — It was held, that though the son was under age, viz. about sixteen years old, the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son ; and Abbott, C. J., observed, " I believe it has been held, that things stolen from a child may be laid to be the property of the parent ; but I think that has been the case *in very young children.*" So also in Smith *v.* Birch, 7 Ibid. 401, it was held, that if a father make to a son under age, an absolute gift of an article of dress or ornament, e. g. a watch, he cannot afterwards, without that son's consent, reclaim the gift ; Mr. J. Vaughn observing, " If the father had made an absolute, solemn, and irrevocable gift of the watch to his son the plaintiff, and the plaintiff had accepted it, the law would not allow the father, without the consent of the son, afterwards to reclaim the gift."

[3] 1 Chitt. Pl. 7.

[4] *Ante*, § 348.

[5] Shields *v.* Davis, 6 Taunt. R. 65 ; Brown *v.* Hodgson, 4 Ib. 189.

eign principal, and paying the freight, can maintain an action on the bill of lading, if it express that the goods were shipped by the agent, and that the freight was paid in England; because a privity of contract is established between the parties by means of the bill of lading.[1] In case of a bailment, it is clear, that the bailee has such a continuing interest in the goods, until their arrival at the place of destination, as to entitle him to sue the carrier, in case they are lost or damaged on their passage. Thus, in Freeman *v.* Birch,[2] (which was an action on the case against a carrier for negligence,) at the trial before Patteson, J., it appeared that the plaintiff, a laundress at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which travelled from Chiswick to London; on one occasion a basket of linen belonging to one S. was sent by the defendant's cart, and on its way to London, parts of the contents were either lost or stolen. S. did not pay the carriage of the linen; and it was objected on the part of the defendant, that the present action was misconceived, and that the action should have been brought by the owner of the linen. The learned Judge overruled the objection, and a verdict was found for the plaintiff. Subsequently, a motion was made for a new trial, on the ground of misdirection, which the Court of Queen's Bench, however, refused, on the ground that, under the circumstances, the bailee must be taken to retain a special property in the goods sufficient to support the action.

§ 493. Upon the decision in the case last cited of Freeman *v.* Birch, it has been remarked: "Though it clearly establishes the right of the bailee to sue, yet this must not be understood necessarily to exclude the bailor from the exercise of a similar right; supposing, that is to say, he chooses to step in and anticipate the bailee in bringing an action; a conclusion which seems to be deducible from the general state

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[1] Joseph *v.* Knox, 3 Campb. R. 320.

[2] Freeman *v.* Birch, 1 Nev. & Man. R. 420.

and condition of property under bailment, which is, as it were, *in dubio* between the parties, and vested for some purposes in the bailee, and for some in the bailor. The right of property being thus floating and undetermined, it seems to follow, that the right of action which arises from it, must partake of the same properties, and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself."[1] It cannot indeed be denied, that the right of an agent or a bailee having a special property in the goods which are the subject-matter of the transaction, to sue for any default of the carrier in respect to them while in the course of transportation, is subservient to the right of the principal to interfere and bring the action, in exclusion of the agent's or bailee's right.[2] The rule in such cases, is stated by Parke, B., to be, that either the bailor or the bailee, in such cases, may sue; and whichever first obtains damages, it is a full satisfaction.[3]

§ 494. It is also an important doctrine, that if it is not expressed, that an agent contracts in behalf of another, and the name of the principal is not disclosed by him, a suit may be maintained in the name of the principal. This doctrine has been acknowledged and applied in a number of instances;[4] and was applied in the case of a common carrier in Sanderson *v.* Lamberton, in Pennsylvania.[5] It was also very recently applied by the Supreme Court of the United States in an important case on appeal in the Admiralty, in which the respondents were common carriers by sea. The case referred to originated in the loss of the Steamboat "Lexing-

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[1] 1 Walf. on Part. to Act. 35.

[2] 1 Chitt. Pl. 8.

[3] Nichols *v.* Bastard, 2 Cro. Mees. & Ros. R. 660.

[4] Among others, in Sims *v.* Bond, 5 B. & Adol. R. 393; Higgins *v.* Senior, 8 M. & Welsb. R. 834; Taintor *v.* Prendergast, 3 Hill, (N. Y.) R. 72; Lapham *v.* Greene, 9 Verm. R. 407.

[5] Sanderson *v.* Lamberton, 6 Binn. (Penn.) R. 129, and *ante*, § 466.

ton," with the cargo on board, by fire, in Long Island Sound, in the month of January, 1840; but the decision was not made until the December term of that Court, 1847. The property in question (a large amount of *specie*) was delivered to one H., an "express" forwarder, for transportation, and by him delivered for that purpose to the New Jersey Steam Navigation Company, who, with other steamboats, run the Lexington to and from New York and Stonington. It was held, that, notwithstanding the contract of affreightment was made by H. with the company personally, and without disclosing the name of the libellants who were the owners of the specie lost, the suit by them against the company should be sustained.[1]

§ 495. The question in respect to *consignors* and *consignees* of goods forwarded from one to the other, and as to which of the two parties is the proper party to bring the action for a loss or non-delivery of the goods while in the course of transportation, is sometimes one of much nicety, and has therefore occasionally provoked critical discussion. The carrier must be liable to one party or the other, and if the wrong party were to recover against him, he would be liable to be harassed again.[2] It is important to look, in endeavoring to decide which is the proper party, to the state and condition of the property, and the relation in which the consignor and consignee stand to it;[3] for neither the consignor nor consignee, as such, is the proper party to bring the action.[4] The relations in which they stand to each other may be reduced to three general heads. 1st. Where the entire property in the goods remains vested in the con-

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1 New Jersey Steam Navigation Company *v.* Merchants Bank, 6 How. (U. S.) R. 344, and Appx. to this work, p. liv., and *ante*, § 466.

2 Per Williams, J., in Coates *v.* Chaplain, 3 Ad. & Ell. R. (N. S.) 489.

3 1 Walf. on Part. to Act. 31, *et seq.*

4 See opinion of Bronson, J., in Everett *v.* Saltus, 15 Wend. (N. Y.) R. 474; Law *v.* Hatcher, 4 Blackf. (Ind.) R. 364.

signor; 2d. where it is in the consignee; 3d. where, as in the cases which have already been cited, both are interested, the one as general, and the other as special owner. In the first case, the law presumes the consignor to be the party who contracts with the carrier, and, therefore, vests in him all rights of action arising out of such contract.[1] If goods are in the course of transmission from a principal to an agent, for any loss or damage occurring to such goods in the course of their passage, the principal would seem to be the proper party to sue.[2] Where goods are sent by a party merely to be approved, the property not passing to the consignee until he receives and adopts the goods, the consignor is entitled to bring the action against the carrier for any breach of his implied undertaking to deliver the goods.[3] Thus, a coat ordered by a customer resident abroad, without instruction as to the mode of conveyance, and which was sent through by the tailor, who paid the freight, and the coat being lost in the transit, it was held, that the vendor was the proper party to sue the carrier.[4]

§ 496. Again, if from fraud, or non-compliance with the requisites of the *statute of frauds*, no actual sale has taken place, so as to transfer the right of property, and the risk of loss, from the consignor to the consignee, the consignor is, of course, the proper party to maintain the action. Thus, where the consignor had delivered goods to a carrier in obedience to a fictitious order, which professed to come from a well known tradesman of respectability, but had in reality been sent by a swindler, it was held, that as no *bonâ fide*

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[1] 1 Walf. on Part. to Act. 33. See D'Wolf *v.* New York Fire Ins. Co. 2 Johns. (N. Y.) R. 214; and see *ante*, § 397.

[2] Wright *v.* Snell, 5 B. Ald. 550; Sargent *v.* Morris, 3 Ibid. 277; and see opinion of Gibson, J., in Griffith *v.* Ingledew, 6 S. & Rawle, (Penn.) R. 429.

[3] Swain *v.* Shepherd, 1 M. & Rob. R. 224.

[4] Goodwyn *v.* Douglas, 1 Cheves, (S. C.) R. 174.

sale had taken place, the consignor had not been divested of his property in the goods, and that he was, therefore, the proper party to sue the carrier for a neglect of duty in delivering to the swindler, who applied for them at the carrier's office, instead of delivering them at the residence of the tradesman to whom they were directed.[1] So if a tradesman sends goods of the value of £10 and upwards, pursuant to an oral order, or an oral contract of sale, to a person who has not given "earnest," or made a part payment, or accepted any part of the goods, and the contract is void by reason of non-compliance with the *statute of frauds*, then, as there has been no actual sale, so as to transfer the right of property and the risk of loss to the consignee, the consignor is the party to sue the carrier.[2]

§ 497. But by the delivery of the goods to a carrier *on behalf* of the consignee, and if they have been placed at his *absolute disposal*, and no other fact appears, the legal presumption is, that he is the true owner, and the property in the goods then becomes immediately vested in him; and therefore, in the event of a loss, he, and not the consignor, must bring the action, for the consignor has his remedy against the purchaser.[3] Lord Alvanley is reported to have said, that it appeared to him a proposition as well settled as any in the law, "that if a tradesman order goods to be sent by a carrier, though he does not name any particular one, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any

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1 Duff *v.* Budd, 6 Moore, R. 469; and see also Stephenson *v.* Hart, 4 Bing. R. 476.

2 Coates *v.* Chaplain, 3 Ad. & Ell. R. (N. S.) 489; Stockdale *v.* Dunlop, 6 M. & Welsb. R. 224.

3 Vale *v.* Dale, Cowp. R. 294; Dawes *v.* Peck, 8 T. R. 330; Everett *v.* Saltus, 15 Wend. (N. Y.) R. 474; Richardson *v.* Dunn, 2 Ad. & Ell. R. (N. S.) 224; Bonner *v.* Marsh, 10 Sme. & Marsh. (Miss.) R. 376.

injury done to the goods, and if any accident happen to them, it is at his risk. The only exception to the purchaser's right over the goods, is that the vendor, in case of the former becoming insolvent, may stop them *in transitu*." [1] Under such circumstances, the consignee alone must bring the action, whether the carrier be a carrier by land, or a carrier by water; [2] for a shipment of merchandise in the possession of a master of a vessel, during their passage from a consignor abroad to the consignee at home, according to the agreement and course of dealing between the parties, operates as an actual delivery to the purchaser.[3] Where the purchaser of goods at Naples brought an action against the carrier for negligence in shipping them; the plaintiff, it appeared, sent an order to M. & Sons, of Birmingham, in England, for the goods in question to be dispatched on insurance being effected, the terms to be three months' credit from the time of arrival. On the part of the defendant it was contended, that, as the goods were not to be paid for until three months after delivery, they were not at the purchaser's risk until their arrival. The Court, however, considered that the order for insurance was decisive as to the point that the goods were at the plaintiff's risk, and that, therefore, the action was properly brought in his name.[4]

§ 498. But in England, there has been no instance in

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[1] Dutton *v.* Solomonson, 3 Bos. & Pull. R. 584; and see Jacobs *v.* Nelson, 3 Taunt. R. 423; Ilsley *v.* Stubbs, 9 Mass. R. 63.

[2] See *ante*, § 79, 298; and Bothlingk *v.* Inglis, 3 East, R. 394; Potter *v.* Lansing, 1 Johns. (N. Y.) R. 215.

[3] Brown *v.* Hodgson, 2 Campb. R. 36. Where goods are purchased in a foreign country in pursuance of orders, the delivery on board the ship is a delivery to the merchant who ordered them; the property is vested by that act, and the merchant has no election to accept or reject them. The Mary & Susan, 1 Wheat. (U. S.) R. 471. But if a shipment be made without, or contrary to, orders, it still remains at the risk of the shipper. The Francis, 2 Gallis. (Cir. Co.) R. 391.

[4] Fregano *v.* Long, 4 B. & Cress. R. 219.

which the right has been held to pass to the consignee, where he has not expressly directed the sending by some particular conveyance, or at least the sending by some conveyance or other.[1] In Coates *v.* Chaplain, in the Queen's Bench, in 1842,[2] it appeared, that the travelling agent of M., a tradesman residing in London, ordered goods for M. of the plaintiff, a manufacturer at Paisley. No order was given as to sending the goods; the plaintiff gave them to the defendant's carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by the defendant's negligence, it was held that the defendant was liable to the consignor.

§ 499. However, there are particular circumstances under which the possession of the carrier is not the possession of the vendee; and the rule laid down by Lord Kenyon, in Dawes *v.* Peck,[3] that the question whether the consignor or consignee is the proper party to sue, must be entirely governed by the question in whom the legal right to the property is vested, is not strictly accurate.[4] Undoubtedly, the person in whom the property of the goods is vested is, in general, the proper party to bring the action; but then he is so, not because the property is vested in him, but because, from that circumstance, the law presumes that he is the party who really *contracts* with the carrier, and that any other person employing the carrier, acts only as his agent.[5] The rule is more properly stated, by Parke, J., in Freeman *v.* Birch,[6] that the person employing the carrier must bring the

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1 Per Williams and Wightwick, Js., in Coates *v.* Chaplain, 3 Ad. & Ell. R. (N. S.) 483.

2 *Ub. sup.*

3 Dawes *v.* Peck, 8 T. R. 332.

4 See Walf. on Part. to Act. 32.

5 See opinion of Gibson, J.. in Griffith *v.* Ingledew, 6 S. & Rawle, (Penn.) R. 429.

6 Freeman *v.* Birch, 1 Nev. & Man. R. 420.

action, but that the circumstance of the legal right being in one person, may be evidence of employment by that person. Hence it follows, that in order to decide who is the proper party to be made plaintiff in an action of this nature, the first inquiry must be, whether any *special agreement* for the carriage of the goods in question exists. If there is none, it then becomes necessary to ascertain in whom the right of property is vested. In the former case, the remedy for any breach of contract, belongs to the party with whom such agreement is made. Therefore, where the consignor agrees with the carrier for the conveyance of the goods, and is to pay him, the action is well brought in his name.

§ 500. Accordingly, it is found, that where any thing exists to contradict the legal presumption that the owner of the goods is the proper party to call for compensation, the owner ceases to be at least the sole party to bring the action. Where a special agreement is shown to exist between the consignor and the carrier, that the former is to pay for the conveyance of the goods, it is no answer to an action brought by the consignor against the carrier, upon such special agreement, to say, that he is not the owner of the goods. In such case, the action may be brought either by the consignor with whom the express engagement was made, or by the consignee as the owner of the goods in whose behalf it was made.[1]

§ 501. In Joseph *v.* Knox,[2] the consignor (the plaintiff) having received goods from Amsterdam, to be transmitted to the consignee in Surinam, shipped them on board the defendant's vessel upon a bill of lading which stated, that the goods were shipped by the plaintiff, that they were to be delivered in Surinam to the consignee or his assigns, and

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[1] Davis *v.* James, 5 Burr. R. 2680; Moore *v.* Wilson, 1 T. R. 659; Robinson *v.* Dunmore, 2 Bos. & Pull. R. 416; and see *ante*, § 492.

[2] Joseph *v.* Knox, 3 Campb. R. 320.

that the freight was paid by the plaintiff in London; it was held by Lord Ellenborough, that the defendant, after having signed such a bill of lading, could not bring the ownership of the goods in question; the consideration upon which the contract was founded moved from the plaintiff; *the undertaking was made to him*, and he was therefore entitled to maintain the action, to recover the value of the goods, and would hold the sum recovered, as a trustee for the real owner.[1]

§ 502. If after the carrier has fulfilled his part of the contract by conveying the goods to the place to which they are directed, it should appear, that there is no such person as the one to whom the goods are addressed, then a new contract arises by *implication of law* between the carrier and the consignor; the carrier holds the goods as the bailee of the consignor, and is bound to take due care of them, and to deliver them to the consignor, on being paid his fair and reasonable charges.[2]

§ 503. There is, says Lord Tenterden, some difficulty in deciding to whom the master and owners of a vessel are responsible on the contract evidenced by the *bill of lading;* and whether actions for loss or injury occasioned by their negligence or misconduct, should be brought by the consignor or consignee.[3] But to contracts for the carriage of goods by sea when they are founded on a bill of lading, the general principles which are above laid down will be found to apply; the only difference being, that in the case of a bill of lading that must first be resorted to, as the medium of proving the intention of the contracting parties.[4] It is true, however, that upon this subject there is some degree of con-

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1 See also Hart *v.* Sattley, 3 Campb. R. 528.

2 Stephenson *v.* Hart, 1 M. & Payne, R. 375.

3 Abbott on Shipp. (5th Am. edit.) 402, 403.

4 1 Walf. on Part. to Act. 37.

fusion and contradiction in the cases;[1] but there can be no doubt, that a consignment as evidenced by the bill of lading is to be controlled and explained by the evident intention of the parties.[2]

§ 504. It was held in Sargent *v.* Morris,[3] that where a merchant ships goods on his own account addressed to his correspondent — there being nothing in the course of dealing between the parties to show an intention that the consignee should take any interest in the consignment — the shipper or consignor, and not the consignee, ought to bring the action. On the other hand, it has been held in Pennsylvania, that where A., of Liverpool, shipped goods which, by the bill of lading, were to be delivered to B., or his assigns, in Philadelphia, and the goods belonged to A., and the freight was payable in Liverpool, sufficient property for the support of the action was vested in B., the plaintiff. But from the

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[1] Per Tompkins, J., in Potter *v.* Lansing, 1 Johns. (N. Y.) R. 225.

[2] See Ludlow *v.* Browne, 1 Johns. (N. Y.) R. 1; Coleman *v.* Lambert, 5 M. & Welsb. R. 502; Hibbert *v.* Carter, 1 T. R. 768; Low *v.* D'Wolf, 8 Pick. (Mass.) R. 101; Allen *v.* Williams, 22 Ib. 297. It has been held by the Court of Errors and Appeals in Alabama, that where goods are shipped, and a bill of lading taken by the shipper, and delivered to the vessel for the consignee, the title to the goods is not thereby necessarily vested in the consignee absolutely; that it depends on the intention of the parties; that if made *for the purpose of passing title*, the delivery of the bill of lading will have that effect; but if, on the other hand, there be no contract of purchase between the consignor and consignee, the owner's title will not be divested. Bonner *v.* Marsh, 10 Sme. & Marsh. (Miss.) R. 376. And see Abbott on Shipp. (5th Am. edit.) 402–416; Craven *v.* Ryder, 6 Taunt. R. 433. It was shown by Tompkins, J. in Ludlow *v.* Browne, *ub. sup.*, that the consignment was open to explanation, whether made to the consignee, or for account and risk of consignor. The case of Hibbert *v.* Carter, 1 T. R. 746, decides, that the correct rule is, that the transfer of a bill of lading to a creditor *primâ facie* conveys the whole property in the goods from the time of its delivery; but it also decides, that if the parties only intended to bind the proceeds, the right of property in the thing is not divested.

Sargent *v.* Morris, 3 B. & Ald. R. 277.

opinion of the rest of the Court Mr. J. Gibson dissented: and the doctrine he deduced from an elaborate review of the authorities, was, that the discriminative circumstances were, 1st, an engagement to pay the freight by the person who brings the action; 2d, an order by the consignee to deliver the goods to any or a particular carrier, for account and risk of the consignee. And, as a consequence of this, 3d, not merely the legal property, but a beneficial interest in the goods existing in the person who brings the action; in all which, the learned Judge considered, the case made out by the plaintiff was deficient. Neither of the above circumstances, he asserted, had ever been considered the substantive ground of the action, but only evidence whether the *contract* was made by the carrier with the consignor or with the consignee. Admitting, said he, that the consignee might have maintained trover on any action founded on *property*, yet the action here was not founded on property, but on *contract;* and that, therefore an interest in the property, which did not draw after it an interest in the contract, was insufficient.[1]

§ 505. In Potter *v.* Lansing, in New York,[2] it was held, that if goods be shipped "for the account and risk of the consignee, he paying the freight," and it is so expressed in the invoice and bill of lading, the delivery to the carrier is a delivery to the consignee, who alone can bring the action against the carrier, in case they are not delivered. It did not expressly appear, that the goods had been delivered by the order of the consignee, but that fact (on which it has been contended, the correctness of the decision most certainly

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1 Griffith *v.* Ingledew, 6 S. & Rawle, (Penn.) R. 429. See in support of the opinion of Judge Gibson, Coates *v.* Chaplain, 3 Ad. & Ell. R. (N. S.) 483, and cited *ante*, § 498; Joseph *v.* Knox, 3 Campb. R. 320, and cited *ante*, § 501; Freeman *v.* Birch, 1 Nev. & Man. R. 420, and cited *ante*, § 499.

2 Potter *v.* Lansing, 1 Johns. (N. Y.) R. 215.

depends)[1] seems to have been assumed by the Court; for Tompkins, J., in delivering the opinion of the majority, goes on the ground, that delivery to the carrier had divested the property of the consignor, and cast the risk on the consignee; an effect that could be produced only by a delivery to order.[2]

§ 506. The right of action upon simple contracts is not confined, as in deeds, to the person with whom the contract is in terms made, but the person for whose *use* such a contract has been entered into may maintain an action thereon, although the contract is not in express terms made with him, but with another in his behalf; and therefore, if the bill of lading be special, to deliver to A. for the *use* of B., B. ought to bring the action.[3]

§ 507. Where a bill of lading is signed in blank, and is subsequently filled up by the person to whom it is sent, by the consignor's authority, it has the same effect in vesting the property as if the particular name inserted had been by the consignor's direction; so that the consignee may, or may not, confer a right of property on a third person. A., of Brazil, being indebted to P. H. & Co. of New York, was requested by them to make a remittance in discharge of his debt; and he thereupon shipped goods on board a vessel bound to Salem on his own account and risk, and sent therewith bills of lading, by which the goods were made deliverable to his own order, and which were indorsed by him in blank, and inclosed to H. & Co. of New York, (successors of P. H. & Co.) with

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[1] By Gibson, J. in Griffith *v.* Ingledew, *ub. sup.*

[2] Ibid. That the goods must have been ordered by the consignee to entitle him to sue, see Coates *v.* Chaplain, 3 Ad. & Ell. R. (N. S.) 483, and cited *ante*, § 498.

[3] Evans *v.* Martlett, 1 Ld. Raym. R. 271; Sargent *v.* Morris, 3 B. & Ald. R. 277; Powell *v.* Bradlee, 9 G. & Johns. (Md.) 220; Everett *v.* Saltus, 15 Wend. (N. Y.) R. 474.

authority to fill up the blank and make the goods deliverable to themselves, or to such person as they might name, with power to receive the proceeds in satisfaction of A.'s debt to P. H. & Co. On the arrival of the vessel at Salem, the bills of lading were forwarded to H. & Co., who filled up the indorsement thereon by making the goods deliverable to C. H. & Co. of Boston, who were to receive and dispose of the goods, and account for the proceeds thereof in payment of A.'s said debt. C. H. & Co. thereupon went to Salem, received the goods and entered them at the custom-house, gave bond for the duties, and became responsible for the freight. While the goods were in their possession, the same were attached as the property of P. H. & Co.; whereupon C. H. & Co. brought an action of replevin against the attaching officer. It was held, that the property in the goods had not vested in P. H. & Co., and that C. H. & Co. were entitled to maintain their action.[1]

§ 508. In Conrad *v.* Atlantic Insurance Company,[2] the bill of lading purported, on its face, to be a shipment by E. T. of a number of kegs of specie, for account and risk of the shipper; to be delivered at Canton to J. T., or his assigns. The Court held, that by the well settled principles of commercial law, the consignee, under these circumstances, was constituted the agent of the owner whoever he might be, to receive the goods, and by his indorsements of the bill of lading, to a *bonâ fide* purchaser for a valuable consideration, without notice of any adverse interests, the latter becomes as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by indorsement, and thus may pass the property. But if the shipper be the owner, and the shipment be made on his own account and risk, although he may not pass the title by virtue

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[1] Chandler *v.* Sprague, 5 Met. (Mass.) R. 306.

[2] Conrad *v.* Atlantic Insurance Company, 1 Peters, (U. S.) R. 386, 445.

of a mere indorsement of a bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order; yet by any assignment, either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser for a valuable consideration, by an indorsement of the bill of lading itself. In the case above mentioned, E. T. was the owner of the goods, and the consignee was merely his factor; he, therefore, had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment against any body, but a purchaser without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition.[1]

§ 509. In an action against a common carrier, where it appeared that the plaintiffs directed J. L. to barter certain chairs for a bale of handkerchiefs, and ship them on board the defendant's packet, to be transported to the plaintiffs; J. L. had the bale delivered on board the packet in order that it might be carried and delivered to the plaintiffs, and they retained certain moneys of J. L. in their hands arising from the sale of butter consigned to them, to the amount of the price of the bale of handkerchiefs, as and for satisfaction. Evidence being given, that the recovery in the cause was for the use of J. L., it was held, that the action could be sustained.[2]

§ 510. Where a consignee at Liverpool on receipt of a bill of lading, by which goods actually laden at Longford were made deliverable to certain persons in Dublin "in care for, and to be shipped, to," him, accepted on the faith of the consignment, a bill of exchange, it was held, that the bill of

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[1] See also Nathan *v.* Giles, 5 Taunt. R. 558; Allen *v.* Williams, 12 Pick. (Mass.) R. 297; Low *v.* D'Wolf, 8 Ib. 101.

[2] D'Anjou *v.* Deagle, 3 H. & Johns. (Md.) R. 206.

lading was evidence of an intention on the part of the consignor at the time of the lading to vest in the consignee, the property in the specific chattels laden, and that he might maintain an action of trover for them, against a person to whom they had been delivered, under a subsequent order of the consignor.[1] The case in respect of the goods thus actually laden at the time the bill of lading was signed, was distinguished from those, in which, there being no documentary or other evidence to prove an intention on the part of the consignors to vest the property in the consignee at the time of the delivery to the carrier.[2] And in the same case, it was held, that goods which were proved not to have been actually laden, or specifically appropriated to the consignee when the bill of lading was given, had not vested in him.

§ 511. Goods may be shipped to the order and "on account and risk" of the assignee as a purchaser, and yet his right to the possession of them be incomplete.[3] Between the consignor and consignee, the agreement or intention may be, that the property in the goods shall not vest in the latter, *until bills of exchange drawn for their amount on the consignee, or on other parties, be accepted.* When this is the case, the master will generally be required to sign bills of lading to deliver the goods to the orders of the shipper, by whom, one part, unindorsed, will be forwarded to the consignee, to notify the shipment, another part indorsed, to the agent of the consignor, to be delivered to the consignee, *when the condition of the consignment has been performed*, by the acceptance of the bills of exchange.[4] Where the direction is not to deliver the goods in case of the existence

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[1] Bryans *v.* Nix, 4 M. & Welsb. R. 775.

[2] Kinloch *v.* Craig, 14 East, R. 582; Nichols *v.* Clint, 3 Price, R. 547; Bruce *v.* Wait, 3 M. & Welsb. R. 15.

[3] Abbott on Shipp. (5th Am. edit.) 404; Wilsmhurst *v.* Bowker, 5 Bing. New R. 5.

[4] Abbott, *ub. sup.*; Brandt *v.* Bowlby, 2 B. & Adol. R. 932.

of certain circumstances, nor until payment should be made by the consignee *in cash;* the property in the goods continues in the consignor.[1] Even after a shipment has been made, and a bill of lading making the goods deliverable to a consignee, by name, has been signed, the consignor and owner of them may attach conditions to the consignment, or revoke it, at any time before the bill of lading, or the goods are actually delivered to the consignee.[2] It thus appears, that the mere shipment of goods does not always vest the property of them in the consignee, though he be a purchaser.[3]

§ 512. Upon a shipment of goods to be sold on joint account of the consignee and consignor, or of the latter alone, at the option of the consignee, the right of property does not vest in the consignee, until he has made his election under the option given him.[4]

13. *Parties to be sued.*

§ 513. The action for the loss of goods delivered to a carrier in consequence of the negligence of the carrier's servant, such as a driver or porter, must be brought against the carrier, and will not lie against the servant. Or as is stated by a learned writer, "An action for negligence of this nature must be brought against the principal, and not against an agent employed in the conduct of the master's business, although the loss has resulted from the negligence of the latter."[5] But if it appears that the contract was made

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[1] The Merrimack, 8 Cranch, (U. S.) R. 317; and see Ludlow *v.* Browne, 1 Johns. (N. Y.) R. 1.

[2] Mitchel *v.* Ede, 3 Perr. & Dav. R. 513, and 11 Adol. & Ell. R. 88. In this case, although the consignor was indebted to the consignee, there was no agreement between them that the goods should be consigned, or advices that they had been consigned, in reduction of the balance due.

[3] Abbott on Shipp. (5th Am. edit.) 407.

[4] The Venus, 8 Cranch, (U. S.) R. 253.

[5] Stark. Ev. 284, 3d Lond. edit.; and see also 2 Greenl. Ev. § 212;

with the servant alone, and independently of the principal, and the servant expressly undertook on his own account to carry the lost parcel, he will then become liable to an action, as the driver of a wagon or stage-coach, carrying parcels on his own account.[1]

§ 514. In Williams *v.* Cranston,[2] where a watch was delivered to the driver of a stage-coach to be carried, it was held by Lord Ellenborough to charge the principal and not the servant; and the action being against the servant only, the plaintiff was nonsuited. The learned Judge said: "I accede to the proposition, that if the defendant could be considered as having taken the watch to be carried on his own account, for a reward to be paid by him, he would be liable, although he acted in fraud of his master. If it could be shown that he had been in the habit of conveying parcels for hire, the case would certainly be altered; but being the mere servant, it cannot be inferred that he took the parcel to be carried for hire and reward, without farther proof. The only fact is, that he was the driver of the coach; no contract has been proved, there is nothing to indicate that the defendant received the parcel otherwise than in the character of a servant. I should have been glad if the case could have been carried farther. At present the loss appears to have resulted from the negligence of the master, through the medium of his servant." It would have been otherwise if the servant had undertaken to carry for hire on his own account, although in fraud of his master.[3]

White *v.* Boulton, Peake, R. 81. That it is a part of the responsibility of the carrier to be answerable for the acts of his servants, see *ante*, § 91, 146. Where a parcel carried from Bath to Bristol, was delivered by the mail-guard to a porter, who received a proportion of the porterage, the rest being paid to the proprietors of the inn where the coach stopped, for booking, it was held, that the porter, being a mere servant, was not liable to be sued for the loss. Cavenagh *v.* Such, 1 Price, R. 328.

[1] See *ante*, § 76, 77.

[2] Williams *v.* Cranston, 2 Stark. R. 82.

[3] Beauchamp *v.* Powley, 1 Mo. & Rob. R. 38.

§ 515. Where an agent does not pursue in any degree the principal's authority; or so far exceeds it as to discharge the principal from responsibility for his acts; or where he acts under an authority which he knows the principal has no right to give, as an agent selling property under a notice that it does not belong to his principal; he (the agent) is personally liable to be sued.[1] As a general rule, an act done for another by a person not assuming to act for himself, but for another person, *though without any precedent authority*, becomes the act of the principal, if subsequently ratified by him. Where, however, a person does not at the time assume to act as agent, a party will not become liable by a subsequent ratification of the act.[2]

§ 516. Where two persons are jointly interested in the mode of conveyance, (a wagon or stage-coach for instance,) each is liable for the negligence of an agent in conducting it; although by a subordinate arrangement between themselves each undertakes the management of the vehicle by his own driver and his own horses, for specified distances.[3]

§ 517. In respect to the *joinder of parties* as defendants, it is now settled with regard to carriers, that where the action is laid in *tort*, and is founded on a breach of Common Law duty, it is several in its nature, and is maintainable

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[1] 1 Chitt. Pl. 10th Am. edit. 35 *a*. *Semble*, that the owner of fixed property, who enters into a contract for its repairs, and parts with all control over the conduct of them, is not liable for any mischief which the contractor may occasion in the progress of the work by negligently depositing materials in the highway in the neighborhood of the property, or other acts of a like nature. Burgess *v.* Gray, 14 Law Journ. N. S. C. P. 184, thus cited in 5 Harr. Dig. 312.

[2] Broom on Part. to Act. 260; Wilson *v.* Furman, 6 Scott, New R. 894. And see New Jersey Steam Navigation Company *v.* Merchants Bank, 6 How. (U. S.) R. 344, and Appx. p. liv., and *ante*, § 494; Chase *v.* Debolt, 2 Gill. (Ill.) R. 371.

[3] Waland *v.* Elkins, 1 Stark. R. 272, and *ante*, § 93.

against some only of those against whom the action is brought. But where the declaration is in *assumpsit* and is founded in contract, the plaintiff must prove a joint promise, as by proof that all the defendants were proprietors.[1]

§ 518. An exception to the general rule as to the non-liability of the agents of carriers to be sued for non-feasance, is established by the principles of maritime law, by which the *master of a ship* is regarded not as the mere servant of the owners, but rather as an independent officer; and consequently he, as well as the owners, is personally responsible for the loss or damage of the property intrusted to his care. The goods are in his custody as soon as they are put on board the vessel,[2] and he is bound to deliver them in the same state in which they were shipped, unless they have become damaged by some inherent defect.[3] In short, it may be laid down as the general rule, that the master is liable to an action when any loss occurs, if not occasioned by the act of God, perils of the sea, or the public enemy. Unless there is some special contract with the owners, the plaintiff has his election to sue either the master or the owners;[4] if there is a special contract with the

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[1] The subject of mis-joinder and non-joinder of parties as defendants, has already been fully considered under another head. See *ante*, § 423, *et seq.*, 434, *et seq.*

[2] See *ante*, § 129, 130.

[3] See *ante*, § 210, 211.

[4] Bac. Abr. Actions, B.; Abbott on Shipp. 5th Am. edit. 300; Marsh. on Ins. 241; 1 Walf. on Part. to Act. 930. It would be of inconceivable mischief and impediment in commercial dealing, if a foreign merchant making a contract of freight with the master, should be compelled for any consequential injury to seek out the owners. The law, therefore, in order to avoid this inconvenience, gives all who deal or contract with the master the two-fold remedy, that they may proceed against either or both. 1 Holt, Law of Shipp. 379; Boson *v.* Sandford, Garth. R. 63; Morse *v.* Slue, 1 Ventr. 190. Molloy says, "the master must see all things forthcoming that are delivered to him, let what will happen; the act of God, or an enemy, perils and dangers of the sea only excepted." Molloy, b. 2, c.

master, the owner is not liable; and on the other hand, if there is a special contract with the owner, the master is not liable.[1]

§ 519. When goods are sent on board a vessel, the master, or person on board acting for him, usually gives a *bill of lading*, upon which the action may be either against the master or owner, though in the shipment of them such a document is not necessary.[2] By this instrument of contract, though made personally with the master, and not with the owners, both he and they are separately bound to the performance of it;[3] and if the action be against the owner, the

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2, s. 2. Upon the principle of public policy, the master of a vessel, by the almost universal law of nations, as well as by the Common Law, is chargeable for all losses not arising from inevitable accident. The *marine* law lays down the rule with essentially the same strictness; and the *civil* law, the source in this instance of the marine law, was equally guarded, and placed masters of vessels and innkeepers under the like responsibility. The reason given in the civil law for the rule, is, that it is necessary to confide largely in the honesty of masters of vessels, on account of the great opportunities they have to commit frauds, which it would be impossible to trace; and the Courts in the United States have always considered masters of vessels liable as common carriers, in respect to foreign, as well as internal, voyages. See opinion of Kent, C. J., in Elliott *v.* Rossell, 10 Johns. (N. Y.) R. 1. The policy of the law in making the master of a vessel liable for the non-delivery of goods lost during the voyage, without the fraud of the master, is to induce him to employ better men in his service. Per Spencer, J., in Watkinson *v.* Laughton, 8 Johns. (N. Y.) R. 213. M'Clure *v.* Hammond, 1 Bay, (S. C.) R. 99; Bell *v.* Reed, 4 Binn. (Penn.) R. 127; Schiefflin *v.* Harvey, 6 Johns. (N. Y.) R. 170, have proceeded upon the principle, that the master of a ship is liable as a common carrier, for an embezzlement happening in the course of a foreign voyage. And see Thorn *v.* Hicks, 7 Cow. (N. Y.) R. 697.

[1] Ibid., and 1 Chitt. Pl. 35 *a*, 10th Am. edit.

[2] 2 Saund. 119.

[3] Abbott on Shipp. 5th Am. edit. 396; Stone *v.* Ketland, 1 Wash. (Cir. Co.) R. 142; Bussey *v.* Donaldson, 4 Dallas, R. 296; Purviance *v.* Angus, 1 Ib. 184; and note (1) to p. 166 of Abbott on Shipp. 5th Am. edit. Although the master and owner of a vessel are both liable to the merchant as carriers, for the loss of goods, yet they are liable only *sever-*

form of declaration against the master will suffice with very little alteration.[1] In cases of this nature, occurring within

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ally, and a joint action cannot be maintained against them. The master is liable in a different character and on a different ground. Where he has no property in the vessel, and has only the conduct and management of the vessel, he is the confidential servant or agent of the owners. They are bound by his contracts, by reason of their employment of the ship and the profit which they derive from it, by the receipt of the freight money. The master is liable on his own contract also for the transportation of the goods, and by virtue of his taking charge of them for that purpose. The liability of the master seems rather to be by express undertaking, even where the owners are known. By the Court in Patton *v.* Magrath, 1 Rice, (S. C.) R. 162.

[1] The following is the form of a declaration against the captain of a ship on his bill of lading for the loss of goods, contained in 2 Chitt. Pl. 365, *a*, 10th Am. edit. "For that whereas the said defendant, before and at the time of the making of his promise and undertaking hereinafter next mentioned, was the master and commander of a certain ship or vessel called the ——, then in [the river Thames,] and bound from thence to [Liverpool, in the county of Lancaster,] to wit, at, &c. (*venue*). And thereupon the said plaintiff heretofore, to wit, on, &c. (*the date of the bill of lading or about it,*) in the river Thames aforesaid, to wit, at, &c. (*venue*) aforesaid, at the special instance and request of the said defendant (*let the following averment agree with the bill of lading*) caused to be shipped and loaded in and on board of the said ship or vessel, whereof the said defendant then was such master or commander as aforesaid, divers goods and merchandise, to wit, ——, then in good order and well-conditioned, (*these latter words are to be omitted, if not in the bill of lading*) of great value, to wit, of the value of £—, to be taken care of and safely and securely carried and conveyed by the said defendant as such master and commander as aforesaid, in and on board of the said ship or vessel, from [the river Thames] aforesaid, to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, to be safely and securely delivered in the like good order and well-conditioned for the said plaintiff, (the dangers of the seas only excepted): and in consideration thereof, and of certain freight and reward to the said defendant in that behalf, he the said defendant then and there undertook, and faithfully promised the said plaintiff, to take care of, and safely and securely carry and convey, and deliver the said goods and merchandise as aforesaid, (the dangers of the seas only excepted); and although the said defendant so being such master of the said ship or vessel as aforesaid, then and there had and received the said goods and merchandise, to be carried, conveyed, and delivered as aforesaid, and although a

the limits of tide water, there is, as we have seen, a remedy in the Admiralty, which lies against the owner and against the ship itself, for the injury done, holding her responsible on account of the responsibility of the owner.[1]

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reasonable time for the carrying, conveying, and delivering of the said goods and merchandise as aforesaid, hath long since elapsed, and the said defendant hath delivered a part (*let this agree with the fact*) of the said goods and merchandise, to wit, —— part thereof, for the said plaintiff, at [Liverpool] aforesaid; yet the said defendant, so being such master and commander of the said ship or vessel as aforesaid, not regarding his duty in that respect, nor his said promise and undertaking, but contriving and intending to deceive, injure, and defraud the said plaintiff in his behalf, did not, nor would take care of, and safely and securely carry or convey the residue of the said goods and merchandises so shipped in and on board of the said ship or vessel as aforesaid, from [the river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, safely or securely deliver the same for the said plaintiff, (although no danger of the seas did prevent him from so doing,) but on the contrary thereof, he the said defendant, so being such master of the said ship or vessel as aforesaid, so carelessly and negligently behaved and conducted himself, with respect to the said residue of the said goods and merchandise, that by and through the mere carelessness, negligence and improper conduct of the said defendant, and his mariners and servants in that behalf, the said residue of the said goods and merchandise, being of great value, to wit, of the value of £ —, became and was wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there caused to be delivered to the said defendant, divers other goods and merchandise, to wit, goods and merchandises of the like number, quantity, quality, description and value, as those in the said first count mentioned, to be taken care of, and safely and securely carried and conveyed by the said defendant, in and on board of a certain other ship or vessel, from [the river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, to be safely and securely delivered for the said plaintiff, for certain freight and reward, to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to take due and proper care of the said last-mentioned goods and merchandise, whilst he had the care and custody thereof, for the purpose aforesaid. And although the said defendant then

[1] See *ante*, § 419 – 422.

§ 520. This great responsibility, which the laws of commercial nations cast upon the owners for the acts of the master, has appeared, says Lord Tenterden, to many persons, at first view, to be a great hardship; but, says that learned writer, "laying aside all considerations of the opportunities of fraud and collusion, which would otherwise be afforded, it should always be remembered, that the master is elected and appointed by the owners; and by their appointment of him to a place of trust and confidence, they hold him forth to the public as a person worthy of trust and confidence; and if the merchants whom he deceives, could not have redress against those who appointed him, they would often have just reason to complain that they had sustained an irreparable injury through the neglect or mistake of the owners, as the master is seldom of ability to make good a loss of any considerable amount." [1]

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and there had and received the said last-mentioned goods and merchandise, for the purpose aforesaid; yet the said defendant, not regarding his duty in that behalf, nor his said last-mentioned promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, whilst the said defendant had the care and custody of the said last-mentioned goods and merchandise, for the purpose last aforesaid, took so little and such bad care of the same, that by and through the mere carelessness and negligence of the said defendant in that behalf, the said last-mentioned goods and merchandise, being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid."

[*Add a general count for not taking care of the goods, as* ante, § 435, *concluding paragraph of note* 3, *and a count for money had and received, if it be supposed the defendant has received the proceeds of the goods.*]

[1] Abbott on Shipp. (5th Am. edit.) 165, 166. The owners of privateers are in like manner liable for any torts committed by the master and crew, in making captures, &c. Ibid. n. 1.

CHAPTER XI.

OF CARRIERS OF PASSENGERS.

§ 521. [(1.) *Difference as to Liability between Common Carriers of Passengers and Common Carriers of Goods.*] The carriage of persons as *passengers*, for hire, in public conveyances, is comparatively of modern practice; and although suits occurred against owners of coaches, for the loss of *goods*, as early as the time of Lord Holt, yet the first case it seems, to recover damages by a person for injury done to him as a *passenger*, was tried in 1791, before Lord Kenyon.[1] The case referred to was White *v.* Boulton,[2] in which that learned Judge, in delivering his opinion, said, "When these [mail] coaches carried *passengers*, the proprietors of them were bound to carry safely and properly." To carry "safely and properly," or "safely and securely," is the obligation which the law imposes upon a special carrier of goods for hire, or a carrier of goods for hire who is not a common carrier of goods. Common carriers of passengers, therefore, are subject to the same degree of liability as private carriers for hire, of goods, which is a liability for all consequences resulting from the want of such care as the thing or person, under the circumstances of the case, requires. But this undertaking, whether as implied by law, or as created by an express promise, does not insure against the forcible attacks of robbers.[3] And herein appears the difference, in respect to liability, between common carriers of passengers and common carriers of goods. The latter, as we

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[1] See opinion of Hubbard, J., in Ingalls *v.* Bills, 7 Met. (Mass.) R. 1.

[2] White *v.* Boulton, Peake's Cas. 81.

[3] See *ante*, § 60.

have seen,[1] are responsible for all damage which does not fall within the excepted cases of the act of God and the public enemy. The policy of the law which imposes this extraordinary responsibility, it is obvious, is not applicable to the *persons* of passengers, although it is properly held to apply to the *baggage* they have with them;[2] it is to give security to property against clandestine combination with thieves, &c. And as the law holds a common carrier of goods to be an insurer, he is entitled, like other insurers, to demand a premium in proportion to the hazards of his employment.[3] In the words of Mr. Chief Justice Parker, of New Hampshire: — "Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies, except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be, that they are responsible like other common carriers of goods."[4]

§ 522. Attempts have, nevertheless, been made to extend the responsibility of carriers of passengers, as to their persons, to all injuries except those arising from the act of God or from the public enemy; but the support of the doctrine has been uniformly resisted, although a very strict responsi-

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[1] *Ante*, Chap. VI.

[2] *Ante*, § 107 – 117, 317 – 323.

[3] *Ante*, § 151 – 154. The rule of law which relates to the transportation of goods was changed as commerce advanced, from motives of policy, and the strict rule above referred to, being introduced for general commercial objects, has no application to persons. Boyce *v.* Anderson, 2 Peters, (U. S.) R. 150. When the rule was changed, see *ante*, § 149.

[4] Bennett *v.* Dutton, 10 N. Hamp. R. 481; and see Hawkins *v.* Hoffman, 6 Hill, (N. Y.) R. 586.

bility as to the persons of passengers is imposed upon such carriers.[1] The carrier has not, and cannot have the same control over persons that he has over inanimate matter, and therefore the law regulating the responsibility of common carriers of goods does not apply to the carrying of human beings of no greater intelligence than that of *slaves*, a description of persons, who, in the nature of things, and in their character, resemble passengers, rather than packages of goods. Hence, the responsibility of the carrier of them should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods and chattels. A slave has volition and has feelings, which cannot be disregarded, and properties of this nature it is impossible to overlook in conveying him from place to place.[2]

§ 523. In the case of the Camden and Amboy Railroad Company *v.* Burke,[3] the Court consider that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to their persons, they are liable only for the want of such care and diligence as is "characteristic of cautious persons."[4] Such then is the difference in respect to responsibility, between common carriers of goods and chattels and common carriers of the persons of passengers; the former being liable for all damage not occasioned

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[1] Aston *v.* Heaven, 2 Esp. R. 533; Story on Bailm. § 590; 2 Stark. Ev. (1st Am. edit.) 344; 2 Greenl. Ev. § 221. Sir James Mansfield, in Christie *v.* Griggs, 2 Campb. R. 79, says, there is a difference between a contract to carry *goods* and a contract to carry *passengers;* for the *goods* the carrier is answerable at all events, but he did not warrant the safety of his *passengers;* his contract with them was to provide for their safe conveyance, as far as human care and foresight would go. And see 2 Kent, Comm. 600, 601.

[2] Boyce *v.* Anderson, 2 Peters, (U. S.) R. 150. See also *ante*, § 122.

[3] Camden & Amboy Railroad Co. *v.* Burke, 13 Wend. (N. Y.) R. 626.

[4] See also the opinion of Chief Justice Marshall, in Boyce *v.* Anderson, 2 Peters, (U. S.) R. 155; Stokes *v.* Saltonstall, 13 Ibid. 181.

by the act of God, &c., and the latter not being liable for any injuries, unless in case of the want of that circumspection and diligence which is "characteristic of cautious persons," *where the limbs, lives, and health of human beings are at their control.* There are, undoubtedly, certain risks which are incurred by all travellers in public vehicles, for which the proprietors of them are not responsible; and these are casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard. If, for instance, a gun should be fired so near a stage-coach as to frighten the horses, and they, becoming unmanageable, upset the coach and injure a passenger, he is without remedy as against the driver or his employers. But for damage done to *goods* in consequence of such an event, in the hands of a common carrier of them, he would be liable. Every wayfarer in a public vehicle must make up his mind to meet the risks incident to the mode of travel he adopts; risks which cannot be avoided by the *utmost degree of care and skill* in the preparation and management of the means of conveyance. A guaranty to this extent is the only one given for the protection of the wayfarer's person by the proprietors of the line.[1] But the liability of common carriers of passengers, as it has been determined and measured by Courts of justice, will be better comprehended by first considering the *duties*, from a departure from which their liability proceeds.

§ 524. [(2.) *Their Duty to receive Persons as Passengers.*] The distinction between a public or common carrier of persons and a private or special carrier of the same, is, that it is the duty of the former *to receive all persons who apply for a passage.* From the cases which establish that a person who represents himself to the public as a common carrier of goods, cannot refuse to convey them from his accustomed place of setting out to his usual place of destination, pro-

[1] See the opinion of the Court in McKinney *v.* Niel, 1 McLean, (Cir. Co.) R. 540.

vided he has room in his coach or wagon ; [1] and also from the general principle recognized in instances similar to the carriage of passengers by public carriers of them, (such, for example, the case of an innkeeper who hangs out a sign and opens a house for travellers,) it follows that there is an implied engagement on the part of public carriers of persons not to refuse those who apply for seats by their conveyance, the privilege of travelling in such a manner, provided there is room for them, and a tender of, or offer to pay, the fare, is made at the time.[2] The case of Bretherton *v.* Wood, is a clear authority in favor of this view of the law ; [3] because if the principle which exists in the case of carriers of goods be attended to, viz. that they are public servants, and therefore responsible for a refusal to perform their duties, it will be clear that carriers of persons are in this respect equally bound to attend to the interests of the community ; the case referred to having established, that in an action against stage-coach proprietors, for an injury to a passenger, by a coachman upsetting the coach, the declaration may be framed in tort for a breach of duty by negligence of servants. The Court observed : — " If it were that the present action was founded on a contract, so that to support it, a contract between the parties to it must have been proved, the objection that is now made would be deserving of consideration. But we are of opinion that the action is not so founded. This is an action on the case against common carriers, upon whom a duty is imposed by the custom of the realm, or in other words, by the Common Law, to carry and convey goods and passengers, safely and securely, so that by their negligence or default no damage or injury may happen. A breach of this duty is a breach of the law ; and for this breach an action

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[1] See *ante*, § 123 – 125, 356.

[2] That an absolute tender is not necessary, and that an offer to pay is enough, see *ante*, § 418.

[3] See 5 Petersdorf, Abr. 48.

lies, founded on the Common Law, and which requires not the aid of a contract to support it." [1]

§ 525. It is in fact beyond all doubt, that the first and most general obligation on the part of common carriers of passengers, whether by land or by water, is to carry persons who apply for transportation; and the obligation results from their setting themselves up, like innkeepers, and common carriers of goods, for a common public employment for hire. It is nevertheless true, that the obligation is subject to the qualifications, that the regular fare be tendered, or there be an offer to pay it; that there be sufficient room; that freshets in a river do not render it impracticable or dangerous to cross a ferry; [2] and that the applicant is not an unfit person to be received as a passenger, and that he had no design to injure the carrier in his business.[3] In Jencks *v.* Coleman,[4] in which

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[1] Bretherton *v.* Wood, (Ex. Ch.) 3 Bro. & Bing. R. 54. Action against the defendant, who kept chaises for hire, for refusing to carry the plaintiff, who had his luggage tied on, and had got into the chaise, when the owner insisted on a previous payment of the hire, which was charged exorbitantly. The plaintiff tendered him the regular fare, and the sum which had at first been agreed on to be taken, but afterwards refused. It was held by Lord Ellenborough, that although the owner might make his own regulation, or any special contract, and insist upon his own established mode of dealing, yet after the person was in the chaise and tendered the money, it was too late to object to complete the journey; the owner of the chaise was bound to proceed; and if the jury found the tender, the plaintiff was entitled to recover. Messiter *v.* Cooper, 4 Esp. R. 260.

[2] The ferry-man has a right to refuse to go until the water falls, and the danger subsides; and the law gives him the right to judge when it is proper for him to cross or not. Cook *v.* Gourdin, 2 Nott & McCord, (S. C.) R. 19.

[3] Story on Bailm. § 591; Ansell *v.* Waterhouse, 2 Chitt. R. 1; Jencks *v.* Coleman, 2 Sumn. (Cir. Co.) R. 221; Bennett *v.* Dutton, 10 N. Hamp. R. 481; Markham *v.* Brown, 8 Ib. 523; Commonwealth *v.* Power, 7 Met. (Mass.) R. 596. The owners of railroads, says Chancellor Walworth, may be prosecuted for damage sustained if they refuse to transport an individual, without any reasonable excuse, upon being paid the usual rate of fare. Beekman *v.* Schenectady and Saratoga Railroad Co. 3 Paige, (N. Y.) Ch. R. 45. And see *post*, § 609.

[4] Jencks *v.* Coleman, *ub. sup.*

the defendant was captain of a *steamboat*, the subject of obedience to reasonable regulations came directly before the Court, and Mr. J. Story said: "There is no doubt that this steamboat is a common carrier of passengers for hire, and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question then really resolves itself into the mere consideration whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such regulations as the proprietors may prescribe, for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and *à fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board, whose object is to interfere with the interest or patronage of the proprietors, so as to make the business less lucrative to them."

§ 526. The proprietors of a *stage-coach* or of a *railroad*, who hold themselves out as common carriers of passengers, are of course bound, in the same manner, to receive all who require a passage, so long as they have room, and they have none of the above-mentioned legal excuses for a refusal. That they run a coach or a car in connection with another, which extends the line to a certain place, and have agreed with the proprietor of such other coach or train of cars not to receive passengers who come from that place, on certain

days, unless they come by his conveyance, is not a legal excuse. The proprietors, by a *notice* brought home to the individual, have no right to limit their general duty in this manner.[1]

§ 527. The case of Bennett *v.* Dutton, in New Hampshire,[2] showed that the defendant was one of the proprietors, and the driver, of a stage-coach, running daily between Amherst and Nashua, which connected, at the latter place, with another coach, running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst, and onward to Francestown. A third person run a coach to and from Nashua to Lowell; and the defendant agreed with the proprietor of the coach connecting with his line, that he would not receive passengers who came from Lowell to Nashua in the coach of such third person, on the same day that they applied for a passage to places above Nashua. The plaintiff was notified, at Lowell, of this arrangement, but, notwithstanding, came from Lowell to Nashua in that coach, and then demanded a passage in the defendant's coach to Amherst, tendering the regular fare. It was held, that the defendant was bound to receive the plaintiff as a passenger, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business.

§ 527 *a*. The *place* of receiving passengers and the *hour of starting* which passenger carriers are bound to observe and conform to, are those which they hold out to the public, and which thus become in the nature of a special contract. Evidence of the usual course of a stage-office for passengers to call there and register their names in the stage-book, where they are to be called for, is evidence to affect the party with

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[1] Bennett *v.* Dutton, 10 N. Hamp. R. 481. [2] *Ub. sup.*

notice.[1] Railway companies are liable to the institution of legal proceedings against them, for not running their trains in conformity with their regular official time tables; the time tables being of the nature of special contracts, so that any deviation from them renders the company liable.[2]

§ 528. The duty to receive persons as passengers upon a tender of the fare, if there be sufficient room, involves the obligation that he shall not be over-crowded, after he has paid his fare and taken his seat, and be thereby, as it were, expelled. The contract must be fairly performed. Thus, if coach proprietors take more than the legal number upon the coach, a passenger may refuse to occupy his seat, and sue for expenses incurred, for the contract entered into by them must be performed *in terms*.[3] And also if places be taken for several persons to go inside a coach *together*, it is a breach of the contract if the owner only provides *distinct* seats for them.[4]

§ 529. It undoubtedly is one of the qualifications to the obligation of common carriers of passengers to receive persons as such who apply, that they are at liberty to reject applicants whose object in obtaining a passage is *to interfere with the proprietors of the conveyance, so as to make their business of transporting passengers less lucrative to them.* This was the subject-matter of controversy in Jencks *v.* Coleman,[5] in which it was said by Mr. J. Story: "Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage-coaches. The proprietors of the Benjamin Franklin (the steamboat) had, as he well knew, entered into a contract with the owners of another line (the Citizens'

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[1] Whitesell *v.* Crane, 8 Watts & S. (Penn.) R. 369.

[2] See Boston "Railway Times" of December, 1849.

[3] Long *v.* Horne, 1 C. & Payne, R. 610.

[4] Ibid.

[5] 2 Sumn. (Cir. Co.) R. 221.

Stage Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with, and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice, that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume, that he was on board for his ordinary purposes as agent. It has been said, that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think, that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions, which arose in regard to them. Suppose, a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption, that his object was unlawful? Suppose, a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be. It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object, be no

solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think, that the proprietors of the steamboat were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities, to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object is to commit a trespass upon his lands? A case, still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at a distance of a few miles, to decoy the passengers away, the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such an agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not. It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially, if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say, that they have a right to act oppressively in such cases. But certainly, they may in good faith make such contracts, to promote their own, as well as the public interests. The only real question, then, in the present case, is, whether the conduct of the steamboat proprietors has been reasonable and *bonâ fide*. They have entered into a contract with the Citizens' line of Coaches, to carry all their passengers to and from Boston. Is this contract reasonable in itself; or is it designed to create an

oppressive and mischievous monopoly? There is no pretence to say, that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to insure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff."

§ 530. Another qualification to which the *prima facie* duty of the owners of stage-coaches, railroads and steamboats to receive persons who apply for a passage, on tender of the fare, is their privilege of *prescribing all reasonable regulations* in respect to the admission of persons into their carriages, depot, &c.[1] Where the entrance of innkeepers, or their servants, into a railroad depot, to solicit passengers to go to their inns, is an annoyance to passengers, or an interruption to the railroad officers in the performance of their duties, the superintendent of the depot may make a regulation to prevent persons from going into the depot for such purpose; and if they, after notice of such regulation, attempt to violate it, and, after notice to leave the depot, refuse to do so, the superintendent and his assistants may forcibly remove them; using no more force than is necessary for that purpose. So,

[1] See opinion of Story, J., in Jencks *v.* Coleman, *ub. sup.*

if an innkeeper who has frequently entered a railroad depot, and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards *obtains a ticket for a passage in the cars*, with the *bonâ fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to get out, and he does not exhibit his ticket, nor give notice of his real intention, but presses forward towards the cars; and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery.[1]

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[1] Commonwealth *v.* Power, 7 Met. (Mass.) R. 596. In the Court of Common Pleas, in Massachusetts, (Essex county, 1849,) an action of trespass was brought against a railroad conductor, for ejecting the plaintiff from the cars of the Boston and Maine Railroad, which was under the following circumstances: The plaintiff got into the cars at Lawrence with a ticket for North Andover, and the rule of the railroad was, that passengers must, immediately after starting, surrender their tickets, or pay their fares if they have no tickets or be turned out of the cars by the conductor. The plaintiff, when asked for his ticket, by the defendant, showed it, but refused to give it up at that time, (alleging that on former occasions he had been turned out of the cars after giving up his ticket,) but promising to give it up when near the end of the route. There was no stopping place between Lawrence and North Andover. The conductor then stopped the train, and on the plaintiff's persisting in his refusal, put him out by force. Mellen, J., ruled, that the regulation of the road was reasonable, and that the plaintiff had no right to retain his ticket till he had got near the end of the route, even if he had not previously known of the rule; and that, on his refusal to give it up, the conductor was justified in ejecting him with a reasonable degree of force. The question left to the jury was, whether unnecessary force was used; and the Judge observed, that the jury on this point would not be nice in scanning the acts of the conductor in the line of his duty, but would make allowance for any little irritation on his part produced by the conduct of the plaintiff. The verdict was for the defendant. Loring *v.* Aborn, reported for the Boston Daily Advertiser, of January 3, 1849.

§ 530 *a*. The propriety and necessity of rules and restrictions as to the entering upon the grounds appropriated to a railroad, and that authority may be properly exercised by the superintendent and agents of the company, in enforcing such rules and regulations, having for their object the public convenience, and the quiet and safety of travellers, as recognized, in the above case, were adhered to in Hall *v.* Power.[1] Still, the Court in this case held the law to be, that the superintendent of a railroad station has not a right to order a person to leave the station and not to come there any more, and to remove him therefrom by force, if he does come, merely because such person, *in the judgment of the superintendent*, and without proof of the fact, had violated the regulations established by the company, or had conducted himself offensively to the superintendent. And, in the trial of an action for assault and battery, brought against such superintendent for expelling the plaintiff from the station, for a supposed violation of one of the company's established regulations, the defendant cannot give evidence of former violations by the plaintiff, of other regulations established by the company.

§ 530 *b*. Owners of railroads, and also those of steamboats, in respect of the propriety of their making reasonable regulations for the conduct of all persons resorting to them, and to their power to enforce such regulations, are in a condition in some degree similar to that of an *innkeeper*, whose premises are open to all guests; yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not complying with regulations necessary and proper to secure such quiet and good order.[2]

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[1] Hall *v.* Power, 12 Met. (Mass.) R. 482.

[2] Per Shaw, C. J., in Commonwealth *v.* Power, 7 Met. (Mass.) R. 601.

Where an innkeeper in a town through which lines of stages pass, and at whose inn the stages stop, permits the drivers of some of the lines to resort to his house without objection, he cannot exclude the driver of a rival line from entering the common public rooms where travellers are usually placed, for the purpose of soliciting passengers for his coach; provided there is reasonable expectation that passengers are there, and he goes at a suitable time, and conducts with propriety. But this right is forfeited by misconduct. Thus, if affrays occur, or guests are disturbed through his fault, or he is guilty of other abuse, the innkeeper, for the protection of himself, or his guests, may prohibit him from entering until the ground of apprehension be removed; and may treat him as a trespasser if he enters after such prohibition.[1]

§ 530 *c*. In some of the States where slavery is permitted, a suspicious strange negro is deemed by law to be a runaway, and stage-proprietors are liable to the master of a slave for taking him as a passenger, knowing him to be a slave, and thus aiding his escape; they are bound to inquire with *due diligence* into the condition of all colored passengers, and suspicious circumstances, notice, &c., require the *utmost diligence*. The question came before the Court of Errors and Appeals in Delaware, as to what is a sufficient degree of diligence in such cases. A colored man presented himself in the night at a place where passengers were usually taken up, and with nothing any more suspicious about him, demanded a passage. He gave his name and residence, and offered written evidence of his freedom, and was thereupon admitted as a passenger, but was set down, after a short distance, for inability to pay his fare, and before arrival where his papers could be examined. It was held, that this did not amount to a want of proper diligence, though the negro should turn out to be a slave.[2] Where the slave of the

[1] Markham *v*. Brown, 8 N. Hamp. R. 523.

[2] Redden *v*. Spruance, 4 Harring. (Del.) R. R. 217. As to the carriage of slaves, as property, see *ante*, § 122.

plaintiff was carried on board a steamboat, and the captain of the boat on the eve of its departure, being informed of the slave being on board, told the plaintiff's agent to search for her, but made no search for her himself, and the slave was carried off in the boat; the Court refused to permit the jury to consider whether the agent of the defendants was guilty of misconduct or negligence in permitting the escape of the slave, and held, that it was the duty of the master of the boat to have made such a search as would have prevented an escape, and in not doing so, the owners of the boat were responsible.[1]

§ 531. (3.) *Their Duty to carry the whole Route.*] If the usual place of alighting from a stage-coach is at an *inn-yard*, it has been decided, that passengers cannot be compelled to get out even at the inn-gate;[2] and if the custom is to carry the passengers to their own homes, or lodgings, in a particular place, that must be conformed to.[3] *A fortiori*, if the proprietors agree to take a passenger to the place to which they profess their coach or car to go, they cannot refuse to proceed at any intermediate stage; for their undertaking is absolute;[4] and hence, in case of accident, they would be bound to provide another conveyance.[5] In Weed *v.* The Saratoga and Schenectady Railroad Company,[6] it was held, that if a railroad company contract to carry passengers and their baggage *beyond the limits of their own road*, their duty as carriers extends through the whole route, in respect to which the contract is made. The defendants in this case having undertaken to carry from Saratoga Springs to Albany, were, in

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1 Navigation Company *v.* Hungerford, 6 G. & Johns. (Md.) R. 291.

2 Dudley *v.* Smith, 1 Campb. R. 167.

3 Story on Bailm. § 600.

4 Jeremy on Carr. 23; Story on Bailm. § 600; Ker. *v.* Mountain, 1 Esp. R. 27; Messiter *v.* Cooper, 4 Esp. R. 260.

5 Jeremy, *ub. sup.*

6 Weed *v.* Saratoga and Schenectady Railroad Co. 19 Wend. (N. Y.) R. 534.

the opinion of the Court, estopped from saying that their duty as carriers continued no farther than Schenectady, the termination of their own road. In order to limit their liability to a part of the route, they should at least have given notice that after the car struck the track beyond Schenectady, the traveller must look to another company, if in fact there was another.[1]

§ 532. Although carriers of passengers are not obliged to admit persons who are notoriously and unequivocally bad;[2] yet, supposing a person to be of infamous character, if he has paid his fare and has been admitted as a passenger, it furnishes no excuse for turning him out, so long as he has not been guilty, during the journey, of any impropriety of conduct; and none for treating him in so scandalous and disgraceful manner, and with such insulting language, as to compel him to leave the conveyance.[3]

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[1] That it is the duty of carriers to carry *goods* to the place to which they are directed, even if such place be beyond the place to which they usually carry, see *ante*, § 95 – 98.

[2] See opinion of Story, J., in Jencks *v.* Coleman, *ub. sup.*

[3] A declaration in assumpsit to carry the plaintiff in a ship to a certain place, alleged as a breach, that the defendants, by their agent, caused him to be disembarked at an intermediate point, and, by their said agent, caused the disembarkation to be conducted in a scandalous, disgraceful, and improper manner, whereby, and also by contemptuous usage and insulting language addressed to the plaintiff by the said agent in effecting said disembarkation, the plaintiff sustained damage. It was held, *first*, that the declaration was good on motion in arrest of judgment; *secondly*, that the Judge at Nisi Prius had rightly received evidence of the language of the captain of the defendant's ship in putting the plaintiff on shore, in which he described the plaintiff as being a pickpocket, and belonging to the swell mob; *thirdly*, that the Judge had rightly directed the jury, that the defendants were responsible for any injury naturally resulting from the acts of the captain, when acting as their servant; and that the plaintiff was entitled to fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore. *Semble*, also, that supposing the plaintiff had been a pickpocket, or belonged to the swell mob, it would be

§ 533. Connected with the duties of public carriers of passengers of receiving persons who offer themselves as such, and of conveying them throughout the entire route they profess to convey them, is the duty of affording, in the progress of the journey, the accommodations they profess to afford. Thus, if there is a general usage to allow certain intervals for refreshment, the carrier cannot, at his pleasure, vary such usage; for it may be that such usage is the very reason for preferring that particular conveyance to the less accommodating arrangement of another line of conveyance.[1] In other words, every passenger is understood to contract for the usual reasonable accommodations.[2]

§ 534. (4.) *Their Duty in respect to Land-worthiness.*] It is laid down, that it is the duty of public carriers of passengers by stage-coaches to provide vehicles reasonably strong, with suitable harness, trappings, and equipments.[3] Lord Ellenborough on one occasion said of stage-coaches, that they must be "*land-worthy*," that he "would at all events expect a clear '*land-worthiness*' in the carriage itself to be established."[4] The question arises then, what is such land-worthiness, or as it is sometimes denominated *road-worthiness*,[5] as will answer the duty imposed in this respect by law?

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no excuse for turning him out of a ship in which he had paid his passage, so long as he was not guilty of any impropriety on board. Coppin *v.* Braithwaite, 8 Jur. 875 — Exch. — Cited in 5 Harr. Dig. 299.

[1] Jeremy on Carr. 23; and see 5 Petersdorf, Abr. 48.

[2] Story on Bailm. § 597. It is on the same principle, that travellers are entitled to the usual reasonable accommodations of an inn.

[3] *Ante*, § 274; 2 Steph. N. P. 983; Story on Bailm. § 592; 2 Kent, Comm. 600, 601; Christie *v.* Griggs, 2 Campb. R. 79; Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. (N. Y.) R. 611; Hollister *v.* Nowlen, 19 Ib. 234, and Appx. xviii.; Cole *v.* Goodwin, 19 Wend. (N. Y.) R. 251, and Appx. p. xxxiii.; McKinney *v.* Neil, 1 McLean, (Cir. Co.) R. 540; Peck *v.* Neil, 3 Ib. 22; Ware *v.* Gay, 11 Pick. (Mass.) R. 106; Ingalls *v.* Bills, 9 Met. (Mass.) R. 1.

[4] Israel *v.* Clark, 4 Esp. R. 259.

[5] See Ingalls *v.* Bills, 9 Met. (Mass.) R. 1.

In a case in which the declaration stated, that the defendant undertook to carry the plaintiff safely, Mr. C. J. Best said: "There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach proprietor warrants to the public, that his stage-coach is *equal to the journey it undertakes;*"[1] and hence it becomes the duty of a proprietor of a stage-coach to examine it *previous to the commencement of every journey.* Indeed, when the vehicle, as is often the case, is crowded with passengers, if no inspection of it takes place immediately previous to each journey, the master of it is guilty of gross negligence.[2] Such was the case in Bremner *v.* Williams,[3] which was an action against the proprietor of a stage-coach to recover compensation for an injury sustained by the plaintiff in consequence of the insufficient state of the defendant's coach. It was proved, that the plaintiff and his two sons got into the *dickey* of the coach for the purpose of being taken to a certain town on the route. After the coach had started, the plaintiff felt a moving of the dickey, and called to the driver and told him of it, and asked him if it was loose. The driver replied, that the motion was produced by the bending of the springs merely, and then drove on; and, soon after, the dickey came off, and the plaintiff fell. On the part of the defendant, the driver was called; who stated, that the coach had come from the coach-maker's where it had been under repair, only three or four days before the accident; that it was not a very old coach; and that he and his master examined it on the very morning on which the accident happened. But on his cross-examination, he admitted, that at the time the plaintiff went, the coach was on its second journey, and that *no examination had taken place* immediately previous to *that* journey. Mr. C. J. Best told the jury, that

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[1] Bremner *v.* Williams, 1 C. & Payne, R. 414.

[2] Ibid.; Ware *v.* Gay, 11 Pick. (Mass.) R. 106; Ingalls *v.* Bills, 9 Met. (Mass.) R. 1.

[3] *Ub. sup.*

it was the duty of the proprietor of a stage-coach to examine it previous to the commencement of *each* journey ; and they found for the plaintiff £51 damages.

§ 535. The duty of a coach proprietor most undoubtedly is to make a most *careful and thorough* examination of his vehicle and equipments immediately previous to each journey, and this is the full extent of his duty, for the warranty on his part implied by law for the sufficiency of his vehicle, does not extend to such hidden and external defects as cannot be guarded against by a sound judgment and the most vigilant oversight ; which in fact is only saying, that common carriers of passengers are not, like common carriers of goods, insurers.[1] Too much weight, it has been considered, has been given to the comparison of Bosanquet, J., in Sharp *v.* Grey,[2] viz. that a coach must be road-worthy on the same principle, that a ship must be sea-worthy ; a comparison which is certainly not correct, unless as applied to the carriage of goods, or baggage.[3] In that case the axletree of a coach was broken, and the plaintiff injured. The coach was examined, and no defect was obvious to the sight ; but after the accident a defect was found in a portion of the iron bar, which could not be discovered without taking off the woodwork ; and it was proved, that it was not usual to examine the iron under the woodwork, as it would rather tend to insecurity than safety. It did not appear, that the defect could not have been seen, on taking off the woodwork ; but it would rather seem, that it might have been discovered. Park, J., considered it a question of fact entirely ; it was clear, he said, that there was a defect in the axletree ; and it was for the jury to say, whether the accident was occasioned by what, in law, is called negligence in the defendant, or not. Tindal, C. J., also puts the case on

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1 See *ante*, § 150, *et seq.*

2 Sharp *v.* Grey, 9 Bing. R. 457.

3 See opinion of the Court in Ingalls *v.* Bills, 9 Met. (Mass.) R. 1.

the ground of negligence and want of proper vigilance, and not on the ground of a warranty of the axletree, like that of a common carrier of goods. In an action by a passenger against the proprietors of a stage-coach in Massachusetts,[1] for an injury occasioned by the insufficiency of the vehicle, the proof was, that the accident was occasioned by the unscrewing and falling off of a *nut* which secured the right fore-wheel of the carriage to its axle. It appeared, that while the coach was driven at a moderate rate upon a plain and level road, without coming in contract with any other object, one of the wheels came off, in consequence of the unscrewing of the nut in question; whereby the coach overset, and fell upon and broke the plaintiff's leg. Whether this was owing to the want of duty, or due care on the part of any of the defendant's servants, was left to the jury; the Court holding, that the evidence made a *primâ facie* case for the plaintiff.

§ 536. The true doctrine upon this subject unquestionably is, that if there is any defect in the original construction of a stage-coach, as for example, in an axletree, although the defect be out of sight, and not discoverable upon a mere ordinary examination, yet if the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor; and the same rule will apply to any other latent defect, which might be discovered by more minute examination, which renders the vehicle not *land-worthy*, and a damage thereby occurs to any passenger.[2] The rule in relation to this particular subject which will probably be always observed as the correct one, is thus very intelligibly expressed by Baron Alderson in the above-mentioned case of Sharp *v.* Grey,[3] in which he says: — "A coach

[1] Ware *v.* Gay, 11 Pick. (Mass.) R. 106.

[2] Story on Bailm. § 592; 2 Steph. N. P. 983; 2 Stark. Ev. (3d Lond. edit.) 295.

[3] *Ante*, § 535.

proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well for such as may exist afterwards, and be discovered on investigation." But that a coach proprietor is liable for an accident in consequence of a fracture caused by an original internal defect, *undiscoverable upon the closest inspection, and unavoidable by human care, skill, and foresight*, is a point which has never been sustained by any decision.[1] On the other hand, the Supreme Court of Massachusetts have decided (though contrary to the instructions to the jury in the Court below,) that where a passenger in a stage-coach received an injury solely by reason of the breaking of one of the iron axletrees in which there was a very small flaw, entirely surrounded by sound iron one fourth of an inch thick, and which could not be discovered by the most careful examination externally, the proprietor of the coach was not answerable for the injury thus received.[2] The result at which the Court in this case arrived, upon a careful consideration of its circumstances, was as follows: — "That carriers of passengers for hire, are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an

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[1] 2 Greenl. Ev. § 222. In Christie *v.* Griggs, 2 Campb. R. 79, the axletree of the coach snapped asunder at a place where there was a slight descent, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury, said: — "As the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant was not liable." The undertaking of the proprietor of the coach, as to the passengers, said the learned Judge, "went no farther than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore," he continued to say, "if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." See also Israel *v.* Clark, 4 Esp. R. 259; Aston *v.* Heaven, 2 Ib. 533; Crofts *v.* Waterhouse, 3 Bing. R. 321.

[2] Ingalls *v.* Bills, 9 Met. (Mass.) R. 1.

accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment, and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present case, were correct in point of law, and that the learned Judge erred in extending the liability of the defendants farther than was proposed in the instructions requested."

§ 537. It is also the duty of coach proprietors to guard against a *mal-construction of the coach in reference to the position of the baggage.* In an action against the proprietor of a stage-coach employed in carrying passengers from Oxford to Leamington, by the plaintiff, who was thrown from the coach and seriously bruised; it appeared at the trial, that the plaintiff took her seat on the back part of the coach, having both her hands occupied so as to prevent her holding by the iron railing on the roof. It appeared farther, that there was a considerable quantity of luggage upon the roof of the coach; that there was no iron railing between the luggage and passengers; and that the plaintiff, being so seated, on the back of the coach, with her back to the luggage, was, by a sudden jerk, thrown from the coach in a street in Oxford, and had her leg broken. Several witnesses proved, that the plaintiff had repeatedly said the accident was not owing to any fault of the coachman, but to the fact of having her hands so full, so as to prevent her holding by

the railing when the jolt took place. The learned Judge (Lyndhurst, C. B.) directed the jury to find for the plaintiff, if they were of opinion that the injury sustained was occasioned by the negligence of the defendant or his servant. The jury found for the plaintiff; and they stated that they so found, on account of the improper construction of the coach, and of the luggage being on the seat. On motion for a new trial, Lord Tenterden, C. J., said:—"I think the direction of the learned Judge was perfectly right; for the mal-construction of the coach, or improper position of the luggage, would be negligence in the defendant or his servants."[1]

§ 537 *a*. Ferrymen whose business it is to convey passengers by land across a river are subject to the same rules in regard to negligence, and they become liable whenever an injury to a passenger can be traced to the slightest neglect on their part. A ferryman cannot escape liability for an injury to a passenger occasioned by the narrowness or shortness of the boat, the want of proper railing, or any like deficiency. His duty is, moreover, to have the *landing* in a complete state of repair for the reception of travellers, and to furnish proper easements for entering the boat, and to provide fastenings to keep the boat in a firm and steady position while passengers are being received.[2]

§ 538. There is as much, if not more, reason why the rules of the Common Law above laid down as applicable

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[1] Curtis *v.* Drinkwater, 2 B. & Ald. R. 169.

[2] Cohen *v.* Hume, 1 McCord, (S. C.) R. 439. A ferryman, as commander of his vessel, and the keeper of the ferry, by public authority, as well as from the liability which attaches for injuries, is to have the sole and entire direction and management of the boat; he may, or may not, at his election and pleasure, constitute passengers his agents. They are to be so considered in every instance where they act discreetly and in subservience to his orders; but where in violation of his authority and directions, should a loss happen from such cause, he is not liable. Ibid. See *ante*, § 165.

to stage-coaches, should be applicable to the modern mode of conveyance by *railroads;* [1] as they take the place of other modes of conveyance in the carrying of passengers.[2]

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[1] See *ante*, § 78.

[2] Commonwealth *v.* Power, 7 Met. (Mass.) R. 596; Eldridge *v.* Long Island Railroad Co. 1 Sand. (N. Y.) R. 89; Beers *v.* Housatonic Railroad Co. 19 Conn. R. 566. In England, provisions are made by the legislature for the punishment of offences committed on a railway and works connected therewith, and calculated to compromise the safety of the traffic on the line of railway, or otherwise to interfere with the due conduct of the company's business. There are two cases provided for: 1st, offences committed by persons employed upon the railway; and 2ndly, those committed by persons in general. 1st. An officer or agent of any railway company, or any special constable duly appointed, and all such persons as they may call to their assistance, may seize and detain any engine driver, guard, porter, or other servant in the employ of such company, who shall be found *drunk* while employed on the railway, or who shall commit any offence against any of the by-laws, rules, or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along, or being upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of the engines, carriages, or trains shall be or might be obstructed or impeded, and convey the party so offending, or any counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace, for the place, &c. If convicted, the offender may be imprisoned, with or without hard labor, for a period not exceeding two months, or fined a sum not exceeding 10*l.*, and in default of payment, may be imprisoned for the above period, or until he pays the fine. 3 & 4 Vict. c. 97, s. 13. The justice, instead of deciding summarily, may send the case to the quarter sessions, and in the mean time either commit the party to prison or take bail for his appearance, with or without sureties; if convicted at the quarter sessions, he may be imprisoned, with or without hard labor, for any period not exceeding two years. The above provision for the punishment of the *servants* of railway companies, is now extended and made to embrace not merely servants, &c. of the company, but likewise all persons employed either by the company or any other person, &c. in conducting traffic upon the railway, or in repairing and maintaining the works of the railway. 5 & 6 Vict. c. 55, s. 17. 2ndly. Of offences committed by persons in general to the obstruction of the traffic on the railway, trespasses, &c. Every person who shall wilfully (3 & 4 Vict. c. 97, s. 15) do or cause to be done, any thing in such manner as to obstruct

When the carriage is by railroad, the railroad company impliedly warrants the road itself to be in good travelling order, and fit for use, and impliedly promises all persons who agree to become passengers, to provide road-worthy engines and carriages,[1] with suitable equipments, and to place each carriage on a proper position in the train.[2] It appears, that a passenger in the cars upon the road of the New York and Erie Railroad Company has recently recovered a verdict of $8000, as compensation for severe injuries sustained by him four years before, maiming him for life, by an accident to the train in which he was. The accident was caused by a defect in one of the *wheels*, which broke, and in consequence thereof the cars were thrown into a gully.[3] Accidents may and have, in our country, occurred by reason of *bridges* insecurely constructed for the passage of the carriages on railroads. In England, in an action brought

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any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or shall aid or assist therein, is guilty of a misdemeanor, and being convicted thereof, may be imprisoned, with or without hard labor, for any time not exceeding two years. And any person who wilfully obstructs, &c. any officer, &c. of the company in the execution of his duty upon the railway, &c. and refuses to depart upon being requested so to do by any officer, &c. of the company, as also any one aiding, &c. therein, may be apprehended and taken before a justice of the peace, &c. and fined any sum not exceeding five pounds, and in default of payment, may be committed for any term not exceeding two calendar months, or until he pays the fine.

[1] Carpue *v.* London and Brighton Railway Co. 5 Adol. & Ell. R. (N. S.) 747 ; Palmer *v.* Grand Junction Railway Co. 4 M. & Welsb. R. 749; Bridge *v.* Grand Junction Railway Co. 3 Ib. 244.

[2] So ruled by Lord Denman, C. J., in Walker *v.* Southwestern Railway Co., Kingston Spring Assizes, 1843, Walf. Sum. of Law of Railroads, 304.

[3] Oliver *v.* New York and Erie Railroad Co., reported in the "New York Express" for October, 1848, as having that week been decided in the Circuit Court of New York, held at Newburgh. The case was to be carried up ; but it was understood, that the Company, before the suit was brought, offered a liberal compromise ; but as they regarded the claim made by the plaintiff as one of extortion, they resisted payment.

against a railway company for compensation for injury received by the plaintiff by the breaking down of a bridge, over which he was passing in a passenger-train, it was held to be a proper question for the jury, whether the defendants had engaged the services of a competent engineer, who had adopted the best method and had used the best materials, and that, if the defendants had done so, they would not be liable; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency in the work.[1]

§ 539. The principle which renders it obligatory upon carriers by land to provide against an improper position of baggage, renders it obligatory upon the owners of *water-craft*, so to construct, arrange, and secure the implements and machinery on board for the management of their vessel, in such a manner as not to expose to injury the persons of passengers on board, by wounding, &c. Where the plaintiff, a passenger in a steamboat, from Hartford to New York, in an action against the owners for injuries sustained by him through the negligence of the master, having proved that, on the arrival of the boat at the dock in New York, the *chain-box* used to keep the boat in trim, was so insufficiently secured, that it rolled across the deck, and striking against the plaintiff threw him overboard, whereby one of his legs was broken, and his body bruised, offered further evidence to prove, that after he was taken from the water, and while sitting upon the wharf, he applied to the master for some of his men to assist him into a carriage, who refused, saying, that he had enough for his men to do on board; it was held, that such evidence was admissible, *first*, because the duty and conduct of the master were involved in the transaction in question, and the evidence

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[1] Grote *v.* Chester and Holy Head Railway Co. 2 Welsb. Hurst. & Gord. R. 251. And see Sharp *v.* Grey, 9 Bing. R. 459, and *ante*, § 536.

was a part of the *res gestæ*;[1] and *secondly*, because the evidence was proper for the purpose of showing the damage sustained. As to the duty of the defendants to do something more than merely to place the plaintiff on the wharf, and there abandon him, without the power of removing himself, the Court remarked: — "Whether, under such circumstances, the law does not require them to go farther, and do what is reasonable and necessary to place him in a situation where he might be taken care of; we do not think it necessary to determine. One thing, however, is certain; if the *law* does not require it, *humanity* does; and before we could sanction as law, a doctrine so contrary to the dictates of humanity, we should require satisfactory reasons in support of it."[2]

§ 540. (5.) *Their Duties in respect to the Character and Competency of their Servants.*] The general rule as to all persons professing to exercise any trade or employment for all persons indifferently, is, that they are bound for a due application, on the part of their servants, of the necessary attention, art, and skill.[3] Skill, as the driver of a stage-coach, or as the engineer, or switch-tender on a railroad, may often be the *gist* of an action by a passenger for the recovery of damages for injuries received from accidents. Persons so employed are voluntary agents, and *profess* to have skill in their employment; and they are employed in business which demands both a high degree of skill and of firmness. They must be such as are, in the first place, fully competent, and in the next, careful and trustworthy in their general character. Upon this subject, there is a perfect

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[1] See *ante*, § 468.

[2] Hall *v.* Connecticut River Steamboat Co. 13 Conn. R. 319.

[3] Physicians, surgeons, and lawyers, as well as smiths and farriers, wherever they engage their services for hire, are responsible for the skill and art necessary to accomplish safely what they undertake, in so far as ordinary skill and art can accomplish it. See *ante*, § 434.

correspondence between the American and the English law.[1] The first may be considered to have been stated by the Court to the jury in Peck *v.* Niel,[2] in which the jury were told, that every person who establishes a line for the conveyance of passengers, and who holds out inducements to persons to travel in his vehicles, for which a compensation is charged, is bound to have skilful and prudent drivers; and that the *utmost* skill and prudence of the driver must be exercised to avoid accidents. The English doctrine on the subject, is laid down by Mr. Chief Justice Best in reference to stage-coaches, but in its reasoning it will equally apply to railroads. "The coachman," says this learned Judge, "must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach-proprietors is not fulfilled, and they are answerable for any injury or damage that happens." [3]

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[1] McKinney *v.* Niel, 1 McLean (Cir. Co.) R. 540; Farwell *v.* Boston and Worcester Railroad Co. 4 Met. (Mass.) R. 49; Carpue *v.* London and Brighton Railway Co. 5 Adol. & Ell. R. (N. S.) 747. And see also McLane *v.* Sharpe, 2 Harring. (Del.) R. 481.

[2] Peck *v.* Niel, 3 McLean, (Cir. Co.) R. 22.

[3] Crofts *v.* Waterhouse, 3 Bing. R. 321. It has been very properly suggested, that railroad engineers should pass examination and be licensed as such, before they should have the charge of a *passenger* train at least — or two classes might be licensed; the first for passenger trains, the second for freight trains. It is too often the case, that engineers run trains who are incompetent to their duty, because they will work for less than a properly qualified class. But what is termed *economy* is too much the order of the day, and is but a spurious economy; and the practice of this doubtful virtue is the cause of many collisions of trains, of running off the track, and of running down travellers at points where the iron road crosses the public highway, upon which no man has a right to jeopardize another person's life or property, who is peaceably enjoying his or her privilege of riding or walking along, by night or by day. See an article entitled "Accidents on Railroads," in the Boston Daily Bee of December 29, 1848.

§ 541. It is very obviously the duty of the proprietors of all public lines of conveyance, not to employ as their servants persons of intemperate habits, and who are liable to be intoxicated while in the performance of the journey;[1] and

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[1] Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181; Wynn *v.* Allard, 5 Watts & S. (Penn.) R. 544; and see McKinney *v.* Niel, 1 McLean, (Cir. Co.) R. 540. A case was tried in the Court of Queen's Bench at Montreal, in Canada, in which the plaintiff was one of the passengers on the stage which ran between Prescott and Montreal, and which was driven into the river, in crossing the Grand Bay, opposite to Point Valois, in the parish of Lachive, by which accident the driver of the stage and the horses were drowned; and the plaintiff, in consequence of being exposed all night, had been obliged to undergo the amputation of both hands, and had lost the use of his left leg. The accident happened about midnight on 10th of February, 1848; and it appeared that the night was a bright star-light night, and that there was no fog. It also appeared by the evidence of one of the passengers that the driver had been *drinking immoderately* before the stage started, and that he believed the driver to be intoxicated. The reason the witness made no objection to being driven by this driver on this account, was because he saw no one at the inn except a boy and a servant girl. The boy cautioned the witness, that the driver had been drinking too much, but the plaintiff did not know what the boy had stated, nor did the witness communicate the boy's caution to the plaintiff. The jury, after being charged by Mr. Justice Smith, returned a verdict of £4,500. In his charge to the jury, the learned Judge, after stating, in general terms, the duties and liabilities of public carriers of passengers, said: — "The law will, (as we have seen,) in tenderness to human life and human limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel by satisfactory proofs every imputation thereof." From this statement of the law there followed three propositions: 1st. That defendants were not liable unless the injury complained of was occasioned by the ignorance, want of diligence, or want of care on the part of the driver, and the simple facts afforded *primâ facie* evidence against them: 2nd. That it was incumbent on the defendants to prove that the driver was a person of competent skill, good habits, well qualified and prepared; and that he acted with reasonable skill and the utmost prudence on the occasion in question: 3rd. That if the driver were a person of skill, well qualified and prepared — if the accident were occasioned by no default on his part; but was the result of inevitable necessity, then defendants were not liable. The learned judge then went over the evidence, showing how it bore upon the foregoing propositions, and remarked that against that evidence there were the arguments of the learned counse

who thus become liable to fail in the exercise of that sound and reasonable discretion necessary to avoid dangers and difficulties; for if the driver of a stage-coach, or the engineer on a railroad, is, under any circumstances, guilty of misconduct, rashness, or negligence, the proprietors will be responsible for any injury resulting therefrom.[1] Thus, the coachman, if he drives with reins so loose that he cannot manage his horses, the proprietors will be answerable;[2] and so, if in passing through any place that is dangerous, he does not inform the passengers of the full extent of the danger.[3] If the driver, when any danger occurs, does not take the safest course, the proprietor is responsible for the mischief which ensues.[4] When no obstruction exists, the driver is not justified in deviating from the accustomed road. Thus, where

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for the defendants. It was here that an enlightened and judicious jury would bring to bear that knowledge of men and things which would lead to calm appreciation of the evidence. They would consider all the circumstances proved — the clearness of the night, the distinctness of the road, the fact that the coach diverged at right angles from the road — and would then see whether they must believe that the driver fell asleep under the influence of liquor, and only knew he was off the track when he plunged into the river; or whether they would believe he mistook the headlands, and fell into this disaster in consequence of that circumstance happening from the fog or other state of the weather, without fault or neglect. One of those two conclusions, it appeared to him, must be adopted. If they should be in favor of giving damages to the plaintiff, it would be proper for them in assessing the amount, to take into consideration, his extreme sufferings and the losses sustained by the derangement of his affairs. It was not for him to recapitulate the dreadfully painful story. They would judge of all the circumstances, and give, he doubted not, a just verdict." The foregoing is an abstract of the case as reported in the Montreal Herald of March 27, 1849. See *post*, § 547, 565.

[1] 2 Kent, Comm. 601, 602; Story on Bailm. § 598; Stokes *v.* Saltonstall, *ub. sup.*; Peck *v.* Niel, 3 McLean, (Cir. Co.) R. 22; McKinney *v.* Niel, 1 Ib. 540.

[2] Aston *v.* Heaven, 2 Esp. R. 533. And see also McKinney *v.* Niel, 1 McLean, (Cir. Co.) R. 540; Cotterill *v.* Starkey, 8 C. & Payne, R. 691.

[3] Dudley *v.* Smith, 1 Campb. R. 167.

[4] Jackson *v.* Tollett, 2 Stark. R. 37; Mahew *v.* Boyce, 1 Ib. 423.

a coach was upset in consequence of such deviation, and an action was brought for a consequent injury, the Judge told the jury, that as there was no obstruction in the road, the driver ought to have been kept within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict; and a verdict having been returned accordingly, the Court granted a new trial on the ground, that the jury should have been directed to consider, whether or not the deviation was the effect of negligence.[1] On the same principle, if the driver of a railroad engine, by negligence or unskilfulness, causes the train to be thrown off the rails, the railroad company is responsible for all damages and injuries, that may be sustained by the passengers in consequence.[2] Misconduct on the part of the driver of a stage-coach may consist in overlading the coach with baggage, and in not taking care to adjust the weight of it, so that the coach is not made top-heavy, and so not liable to overset.[3]

§ 542. In an action on the case for negligence and misconduct on the part of the driver, the declaration stated, that the plaintiff "had agreed to become a passenger" by the defendant's omnibus, and that the defendant "received the plaintiff as such passenger." Plea, that the plaintiff did not become a passenger, and that the defendant did not receive him as such. It appeared that the plaintiff held up his finger to the driver of the omnibus, who stopped to take him up, and just as the plaintiff was putting his foot on the step of the omni-

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1 Crofts *v.* Waterhouse, 3 Bing. R. 319. If the driver leaves the common track and takes one not used, which increases the risk, it is evidence of negligence. McKinney *v.* Niel, 1 McLean, (Cir. Co.) R. 540.

2 Carpue *v.* London and Brighton Railway Co. 5 Adol. & Ell. R. (N. S.) 747; Beers *v.* Housatonac Railroad Co. 19 Conn. R. 566; Farwell *v.* Boston and Worcester Railroad Co. 4 Met. (Mass.) R. 49.

3 Long *v.* Horne, 1 C. & Payne, R. 612; Israel *v.* Clark, 4 Esp. R. 259; Aston *v.* Heaven, 2 Ib. 533; Heard *v.* Mountain, K. B., 1826, cited in 5 Petersdorf, Abr. 54.

bus, the driver drove on, and the plaintiff fell on his face on the ground. It was held, that this was evidence to go to the jury in support of the declaration; as the stopping of the omnibus implied a consent on the part of the driver to take the plaintiff as a passenger.[1]

§ 543. (6.) *Their Duties in the progress of the Journey in respect to Rate of Speed.*] The duties of the driver of a stage-coach in driving on the road are very important, and if any injury occurs to a passenger in consequence of furious driving, the proprietor will be responsible.[2] If one of the linch-pins come out, and the wheel by which it was secured comes off, and the jury are of opinion that the accident proceeded from such rate of driving, the proprietor is responsible for all injury thereby done to the passengers.[3]

§ 544. There has been a case in this country which authorized very exemplary damages by the jury, to a stage-coach passenger, for injuries which he received in consequence of the rash and furious driving of the coachman. In McKinney *v.* Niel,[4] it appeared that the defendant was an extensive stage-proprietor, and run the lines of stages from Columbus to Zanesville, in Ohio; and that the plaintiff, being in Columbus, took a seat for the next morning's stage to Zanesville. It was observed on the route, by the passengers, that the driver drove *very fast;* and it appeared, that after a short delay at Jack-Town, the driver continued on his route at the same rapid rate. The driver passed on the right hand side of a two-horse wagon of a Mr. H., a witness, who was driving in the same direction as the stage; and who, hearing the stage, turned his horses to the left, which gave to the stage

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[1] Brien *v.* Bennett, 8 C. & Payne, R. 724.

[2] Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181; Gough *v.* Bryan, 5 Dowl. P. C. 765.

[3] Mayor *v.* Humphries, 1 C. & Payne, R. 251.

[4] McKinney *v.* Niel, 1 McLean, (Cir. Co.) R. 540.

more than half the road. The stage passed without coming in contact with the wagon, and the witness observed that all the horses except one, which was a very fast trotter, were in full gallop. The stage had a patent lock or rubber, but the driver, instead of using the lock to retard the progress of the stage, in descending a hill, applied the whip twice within the observation of the witness; and the hill was between a quarter and a half a mile long. After passing the wagon, the horses ran to the verge of the right hand side of the road, and then inclined to the left. The plaintiff, and another passenger on the outside, remonstrated with the driver more than once, and requested him to use the lock; but he refused to do so, saying to them there was no danger. The horses continued their direction to the left, until the near wheels of the stage ran off the paved road a foot or two, and continued so to run some two or three rods, when the horses turned to the right, and the stage upset with great violence. The ground where this occurred was nearly level. The off-wheels ran on the paved road, but the descent was small from the paved to the unpaved part of the road; and, with ordinary good driving, the coach could have been in no danger of upsetting. It, however, did upset, and at the time of the accident the speed of the horses was about as great as it had been. The consequence was, that the plaintiff was picked up shockingly and dangerously mangled; and so serious were the injuries he received, that there was little chance that he would ever entirely recover from them. The Court, in their charge to the jury, told them, that "the driver must not only be skilful, but he is bound to exercise the utmost degree of care; and if they should think, from the evidence, that in commencing the descent of the hill and driving down it, in the manner proved, he acted imprudently or rashly, the defendant was liable; although they should find that the immediate cause of the upset was, the *breaking of the lines*. "The least degree," said the Court, "of imprudence or want of care in the driver fixed the liability of his employers; and if, in the present case, in descending the hill, such an impetus was

given to the coach as to render it difficult and hazardous for the driver to check and control his team, the defendant was liable." The jury returned a verdict of *five thousand and three hundred and twenty-five dollars*, in damages.

§ 545. *A fortiori*, the proprietors of a stage-coach will be responsible for the consequences to a passenger of an accident occasioned by the *racing* of his driver against other coaches; and it is the duty of a driver not to drive unbroken and vicious horses, and not to excite such horses as are broke and not naturally vicious, to such a rate of speed, that they cannot be stopped, or properly directed.[1] In all cases of collision in a public road, if the jury believe that a driver of a vehicle was engaged at the time in a *trial of speed*, the jury may give very *exemplary* damages.[2] In the Circuit Court of the United States, for the seventh Circuit, in the year 1840, an action was brought for an injury done to the plaintiff's wife, by the overturning of the stage through the carelessness of the driver, the defendant being the proprietor. It appeared that there were two stage lines on the route between Marietta and Zanesville, Ohio; and that one carried the mail. Niel's line was run in opposition to the mail line, and Peck and his wife took the former at Zanesville for Marietta. The stages left Zanesville at about the same hour. The accommodation sometimes passed the mail stage whilst detained at a post-office. The horses in both lines were driven rapidly, often at their full speed, against the remon-

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[1] Per Best, C. J., in his charge to the Wilts Grand Jury, cited in note to 8 C. & Payne, R. 694. See also Monroe *v.* Leach, 7 Met. (Mass.) R. 274; Churchill *v.* Rosebeck, 15 Conn. R. 359. Though a party should lose all control of his horse, in driving, in a public road, and an injury ensues in consequence, yet if the loss of control was the result of the defendant's prior faults, the plaintiff may recover. Kennedy *v.* Way, *ub. sup.*; Chaflin *v.* Wilcox, 18 Vermt. R. 605.

[2] Kennedy *v.* Way, Sup. Co. of Pennsylvania, Nisi Prius Term at Philadelphia, March 23, 1850, reported in Law Rep. for August, 1850, p. 184.

strance of the passengers in Niel's accommodation line. When within abont six miles of Marietta, the mail stage overtook the other about a quarter of a mile before they reached a hill; the driver of the mail coach requesting the other driver to give half the road and he would pass him. The driver answered, that he was not so anxious for a race as that. The mail driver then turned his horses to the right, whipped them and hallooed, and thus started the horses in the other stage, which had been moving rather slowly. The horses in the accommodation stage did not go fast, but jumped; the driver struck the off-wheel horse, in order, as he alleged, to bring him nearer the tongue, and give half the road to the other stage. The driver pressed the lever, and Donaldson, who sat with him, raised the reins, and, with the driver, pulled them. The other coach inclined to the left, until the wheel of the mail coach locked in the fore-wheel of the other coach, broke its double tree, and threw the stage and horses over a precipice, whereby the plaintiff's wife, Mrs. Peck, was severely injured. Several physicians stated, that her health by this injury had been permanently impaired, her arm disabled, and it was the opinion of some, that the injury she received would probably shorten her life. *There was evidence conducing to show a concerted arrangement between the two drivers in regard to racing, and it was fully proved, that the horses in both stages were driven over a greater part of the route in a most rapid and reckless manner, against the remonstrance of the plaintiff, Peck.* On the evidence, the Court charged the jury, that, to exonerate the defendant from liability, he must show that every precaution was used by his agent to prevent the injury which occurred; that every omission of duty by the driver, which in any degree increased the risk of the passengers, subjected the defendant to damages for an injury done them; that although the upsetting of the coach may have been caused immediately by the driver of the mail coach, for which he and his employers were liable to damages, still if Niel's driver, under the circumstances, did not use all the means which a skilful and prudent driver could

and would have used to prevent the injury done, the defendant was liable. The jury returned a verdict for the plaintiff, and assessed the damages at *five thousand dollars*.[1]

§ 546. It of course follows, that driving so rapidly over a *railroad* by the servants of the company, as to amount to rashness, is equally inexcusable; and the fact of rashness will depend much upon the condition of the road. What would not be an improper rate of speed over one portion of the rails, might be in another, as for instance, where the rails are sprung, the sleepers broken, or the bridges not roadworthy. Evidence may unquestionably be given, that an injury was received by a passenger in consequence of the improper speed with which cars on a railroad were drawn over a spot which presents the obstructions and defects like these just mentioned.[2] In short, when the carriage is by railroad, the railroad company impliedly warrants the road to be in good travelling order and fit for use. Then again, supposing the condition of the road itself to be ever so good, the conductor of the train is guilty of misconduct, by endeavoring to drive his train to a certain station before it is reached by a counter train; for if the conductors of both trains are governed by the same idea, the passengers are exposed to the dangers of a *collision*.

§ 547. The liability of the passenger carrier, for a neglect of duty in respect to rapid and furious driving, will be the same, although the injury resulting to the passenger therefrom is occasioned by his own act, as by *leaping from the vehicle*, when the state of peril will justify it. Such an act the law deems a natural and prudent precaution to extricate a person from peril, for which the proprietor of the line

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[1] Peck & Wife *v.* Niel, 3 McLean, (Cir. Co.) R. 22.

[2] Carpue *v.* Brighton and London Railway Co. 5 Adol. & Ell. R. (N. S.) 747. And see Farwell *v.* Boston and Worcester Railroad Co. 4 Met. (Mass.) R. 49.

would have been liable. The case of Jones *v.* Boyce,[1] was an instance of this sort, although the coach in which the plaintiff was a passenger, was not actually overturned. In the before-mentioned case of McKinney *v.* Niel,[2] in which it appeared that the plaintiff recovered heavy damages, where the coach, on the roof of which he was travelling, was upset by the recklessness of the driver in fast driving; it was evident from the manner of the injury, that the plaintiff attempted to jump from the coach, and that the top of it must have fallen upon him. In Stokes *v.* Saltonstall, in the Supreme Court of the United States,[3] which was an action for damages against the owners of a line of stage-coaches from Baltimore to Wheeling, it appeared that the defendant in error, with his wife, had been passengers in one of the coaches which was upset, by reason of which the wife had several bones in her body broken, and was otherwise greatly injured. It was proved, that at the last change of horses before the accident, the passengers generally remarked, that the driver seemed to have drank too much to go on. When the coach arrived at a certain part of the route, the passengers felt the coach strike against a mound or ridge on the right side of the road. The husband, on perceiving this, immediately jumped out, as was believed with the intention of stopping the horses; his wife attempted to follow, but fell to the ground at the instant the coach upset, and it fell directly on her; and this was in the afternoon in broad daylight; and she was thereby injured in the manner above-mentioned. The injury was occasioned by the falling of the coach on her body. The road was not considered dangerous or difficult. The driver was believed to be intoxicated, and his intoxication believed to be increased by his drinking with a man on the seat along side of him; which belief was produced by a recklessness and irregularity in driving, which

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[1] Jones *v.* Boyce, 1 Stark. R. 493.

[2] McKinney *v.* Niel, 1 McLean, (Cir. Co.) R. 540; and *ante*, § 544.

[3] Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181.

called for repeated remonstrances from the passengers. He appeared unfit for any thing, would answer no question, nor afford the least assistance. The husband, it was held, was entitled to recover, and he and his wife, it was also held, had reasonable ground for supposing that the coach would upset; although the jury might believe, from the position in which the coach was placed by the negligence of the driver, the attempt of the husband and his wife to escape, may have increased the peril, or even caused the coach to upset. The same doctrine applies equally to railroad carriages as to stage coaches.[1]

§ 548. But, undoubtedly, where the injury arises to a passenger from a rash and undue apprehension of danger on his part, as when a passenger, thinking himself in peril, leaps from a stage-coach to save himself, when in reality he is in no peril, the coach proprietor will not be liable. It is, however, a delicate point, and one which must be left for a jury on the evidence to determine.[2] In Ingalls *v.* Bills, in Massachusetts,[3] at the trial in the Court of Common Pleas, before Williams, C. J., the plaintiff introduced evidence tending to prove, that on the 23d of September, 1841, he and several other persons took outside seats, as passengers, on the top of the defendants' coach, to be conveyed from Boston to Cambridge; that on the way, in Court Street in Boston, while proceeding at a *moderate rate*, and without coming in contact with any thing, the hind axletree of the coach broke, one of the hind wheels came off, and the coach settled down on one side, without being overset; that the plaintiff and some other outside passengers jumped from the top of the coach upon the pavement; and that the plaintiff's left arm was thereby badly injured. The defendants insisted, that if the plaintiff jumped from the coach without necessity, and that necessity

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1 Eldridge *v.* Long Island Railroad Co. 1 Sand. (N. Y.) R. 89.

2 1 Bell, Com. 372.

3 Ingalls *v.* Bliss, 9 Met. (Mass.) R. 1.

brought upon him by them, they were not liable; and that although a passenger might have jumped off without imprudence, his jumping off was to be considered as his own act, and was done at his own peril. Upon this point, the learned Judge directed the jury to inquire whether the plaintiff's jumping off was, under the existing circumstances, an act of reasonable precaution; and instructed them, that if the plaintiff was placed in such a perilous situation in consequence of the defendants' failure to fulfil their obligations, that, as a prudent precaution, for the purpose of self-preservation, he was induced to leap from the coach, the owners were answerable for any injury he might have sustained thereby; although it might now appear that he might, without injury, have retained his seat. The jury, under this direction, returned a verdict for the plaintiff.

§ 549. (7.) *Their Duty as to an Observance of the proper Side of the Road, and as to avoiding Collision.*] The rules and directions for the mode of driving, in order to avoid *collision*, upon the public roads and highways of England, have become established by custom. The first of them is, that in meeting, each party shall bear or keep to the *left;* which is the reverse of the rule in this country; that is to say, *in this country* each party shall bear or keep to the *right.*[1] Secondly,

[1] By the Rev. Stat. of Massachusetts, c. 51, travellers in carriages who meet on a road, are required, under a penalty, seasonably to drive their carriages to the *right* of the middle of the *travelled* part of the road; and they cannot avoid the penalty by seasonably turning to the right of the wrought part of the road, though they leave sufficient room for the travellers whom they meet, to pass with convenience and safety, in the use of ordinary care and skill. With regard to the neglect of this duty, as a public offence, it can make no difference whether sufficient room is left for the other party to pass, if he had not also been guilty of negligence in not using ordinary care. It is the negligence or wrongful act of the defendant that constitutes the public offence, irrespective of the want of ordinary care of the other party. Such would be the rule as to an indictment against an individual for a nuisance on the highway; though in a civil action for damages by a party travelling on such road, a very different rule

that in passing, the foremost person bearing to the left, the other shall pass on the off-side. Thirdly, that in crossing, the driver shall bear to the left hand, and pass behind the other carriage.[1] But the rule is not inflexible, in England, that a driver is bound to keep on the regular side of the road; although if he does not keep on the regular side, he is bound to use more care and caution, and keep a better look-out to avoid collision, than would be necessary, if he were on the regular or proper side.[2] But that the law or usage of the road is not the criterion of negligence was expressly held in Wayde *v.* Carr.[3] In this case, the defendant's carriage was on the wrong side of the road, and in attempting to pass on the near inside of the off-side, the plaintiff sustained damage; and it was held, that it was for the jury to decide the question of negligence, without regard to the law and usage of the road. Whatever, said the Court, might be the law of the road, it was not to be considered as inflexible and imperatively governing a case of this description. "In the crowded streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called 'the law of the road,' would not only be justifiable but absolutely necessary. Of this the jury were the best judges, and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of

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might be applicable. Commonwealth *v.* Allen, 11 Met. (Mass.) R. 403. In a complaint, under the statute above referred to, against a traveller for not driving his carriage to the right of the middle of the *travelled* part of the road, it is not necessary to set forth a particular description of the road. Ibid. See *post*, § 556 – 563. That the rule, in this country, is to take the right side of the road, Wilson *v.* Rockland Man. Co. 2 Harr. (Del.) R. 481.

[1] 2 Steph. N. P. 984; 5 Petersdorf, Abr. 55; Story on Bailm. § 599; Wayde *v.* Carr, 2 Dow. & Ry. R. 25.

[2] Pluckwell *v.* Wilson, 5 C. & Payne, R. 375.

[3] Wayde *v.* Carr, 2 Dow. & Ry. R. 255. A person on the regular side of the road may be guilty of negligence. M'Lane *v.* Sharpe, 2 Harring. (Del.) R.

the defendant's servant. They had acquitted him of negligence; and having all the circumstances of the case before them, had found their verdict for the defendant."

§ 550. There may be occasions upon which it becomes the duty of the driver to deviate, to a reasonable extent, from the proper side of the road.[1] Thus, if a coachman is on the proper side, and sees a horse coming furiously along on the wrong side, it is the duty of the coachman to give way and avoid an accident; although, in so doing, he goes *a little* on what would otherwise be his wrong side of the road.[2]

§ 551. If a coachman deviates even from the *limits of the road*, and thereby the coach is upset, the proprietors of the coach will not be liable for any damage thereby occasioned, if it appears that such deviation from his duty to keep the road, was not owing to any want of that skill and diligence which the law requires in him, but is altogether imputable to an unavoidable mistake, or sudden alteration of the guiding objects on the road.[3]

§ 552. If the street or road is very broad, the driver is not bound to observe the proper side of the road. In Wordsworth *v.* Willan,[4] which was an action on the case against the defendants, proprietors of a stage-coach, for the negligence of their servant in driving so near the path on the wrong side of the road, that the plaintiff's horse, becoming frightened, and plunging, came in contact with the coach and broke his leg; it was said by Rook, J., that it could not be laid down as a certain rule, nor did public convenience require, that the driver is, under all circumstances, bound to

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[1] Ibid.

[2] Turley *v.* Thomas, 8 C. & Payne, R. 103. The rules of the road, in England, are equally applicable to cases of persons on horseback, as well as to persons driving carriages. Ibid.

[3] Story on Bailm. § 599; Crofts *v.* Waterhouse, 3 Bing. R. 321.

[4] Wordsworth *v.* Willan, 4 Esp. R. 273.

keep on what is considered the proper side of the road; and that if there was no interruption of any other carriage,[1] or the road was better, public convenience did not require that the driver should adhere to that law of the road. He took the rule to be, that if a carriage coming in any direction left sufficient room for any other carriage, horse, or passenger, on its proper side of the way, it was sufficient; but that it was evidence for the jury if the accident arose from want of that sufficient room; the driver was not to make experiments.

§ 553. If there is no other carriage to intercept the driver, he may pass on what part of the road he may think most convenient. It appeared in evidence, in Aston *v.* Heaven,[1] that the accident for which the action was brought arose from the horses having taken fright, and that no fault was imputable to the driver. It was held, that the owners were not liable in damages to the plaintiff, although it was proved that the carriage was driving in the middle of the road; whereas, had he been driving on the proper side, the accident might not have happened, on account of the great distance from that side where the bank was which occasioned the accident; Eyre, C. J., observing, that when there is no other carriage to intercept the driver, he may go on what part of the road he thinks fit.

§ 554. In Mahew *v.* Boyce,[2] the plaintiff was a passenger by a coach which was overturned in consequence of its coming in contact with the vehicle of the defendant, under the following circumstances: The coaches were both directed to the same place. The driver of the latter, during the night, attempted to pass the other coach at the top of a hill, and just as it was about to turn an angle in the road to the left. It was, however, contended, on the part of the defendant, that at that period his coach had sufficient room left to pass

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[1] Aston *v.* Heaven, 2 Esp. R. 533.

[2] Mahew *v.* Boyce, 1 Stark. R. 423.

that on which the plaintiff was travelling, there being a space of *seventeen feet* wide to the right of the latter; and that the accident would not have occurred had it not been occasioned by the fact of the leading horses attached to the latter having been driven in an oblique direction from the left to the right side of the road. But it appearing that the situation of the coach, by which the plaintiff was a passenger, had been seen some time before the defendant's coach came up, and that the driver of the latter might, by having driven nearer to the right side than he did, have effectually guarded against the mischief, — Lord Ellenborough said: "This is decisive of the case; if it be practicable to pursue a course which is safe, and you follow so closely upon the track of another that mischief may ensue, you are bound to adopt the safe course. The coach on which the plaintiff was seated had at the time the whole free range of the road, and the driver had a right to occupy any part of it, unless he was aware of the proximity of the defendant's coach. This accident occurred in the night-time. Risk might consequently have been doubly apprehended. The driver of the coach belonging to the defendant ought therefore to have calculated upon the exercise of the other's right to traverse the whole space of the road, and have kept nearer the right side than he did, by which means this suit might never have been instituted." The verdict was for the plaintiff.

§ 555. In cases where parties meet *on the sudden*, and an injury results, the party on the wrong side of the road should be held answerable, unless it clearly appears that the party on the proper side had ample means and opportunities to prevent it. A man, says Chief Justice Best, "may not *on a sudden*, be sufficiently self-possessed to know in what way to decide; and in such case the wrong-doer is the party who is to be answerable for the mischief; though it might have been prevented by the other party's acting differently."[1]

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[1] Chaplin *v.* Hawes, 3 C. & Payne, R. 554.

§ 556. Whenever a collision of two carriages occurs, the driver, by whose negligence or misconduct it occurred, must of course be responsible for the consequences. But the rule in all cases, where an action is brought for damage so occasioned, is, that if it appears that the damage was occasioned *partly* by the negligence of the plaintiff, and *partly* by that of the defendant, the action cannot be maintained; and if the plaintiff's negligence *in any way concurred* in causing the damage, he is not entitled to recover.[1] As was said by Lord Ellenborough, "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases," the learned Judge continued to say, "of persons riding upon what is considered the *wrong side of the road*, that would not authorize another purposely to ride up against them; for one person being in default will not dispense with another's using ordinary care for himself."[2] The rule of law thus laid down was declared by Parke, B., in the case of the Grand Junction Railway Company, to be "perfectly correct." This case was an action for the negligent management of a train of *railroad cars*, whereby it ran against another train, in one of which the plaintiff was riding, and whereby he was injured. It was pleaded, that the parties having the management of

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[1] Pluckwell *v.* Wilson, 5 C. & Payne, R. 375; Williams *v.* Holland, 6 Ib. 23; Monroe *v.* Leach, 7 Met. (Mass.) R. 274; Churchill *v.* Rosebeck, 15 Conn. R. 359; Simpson *v.* Hand, 6 Whart. (Penn.) R. 311; Rathbun *v.* Payne, 19 Wend. (N. Y.) R. 399; Barnes *v.* Cole, 21 Ib. 188; Hartfield *v.* Rover, Ib. 615; Brownell *v.* Flaggler, 5 Hill, (N. Y.) R. 282. The rule is the same in respect to carriers by water. Vandeplank *v.* Miller, 1 Moo. & Malk. R. 169; Luxford *v.* Large, 5 C. & Payne, R. 421; Sills *v.* Brown, 9 Ib. 601; and see *ante*, § 167, note 2; and *post*, Chap. XII. § 634, *et seq.*

[2] Butterfield *v.* Forrester, 11 East, R. 60. In this case it was held, that one who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.

the train in which the defendant was, managed it so negligently and improperly, that *in part* by their negligence, the defendant's train ran against the other, and caused the injuries which the plaintiff received. It was held, that the plea was bad in *form*, as amounting to "not guilty;" and also bad in *substance*, for not showing, not only that the parties under whose management the plaintiff was were guilty of negligence, but also that by *ordinary care*, they could have avoided the consequences of the *defendant's negligence*.[1]

§ 557. The important doctrine laid down in the preceding section, has been repeatedly recognized and applied in this

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[1] Bridge *v.* Grand Junction Railway Co. 3 M. & Welsb. R. 244. In case, for driving a *coach* of the defendant against the plaintiff's carriage, in which were two of his sons, and injured it and them; it was pleaded, that the plaintiff's carriage was under the guidance and direction of one of his sons, who was driving it, and that the defendant, by his servant, was carefully and properly driving his coach; that if the plaintiff's son had driven his carriage carefully and properly, no collision would have taken place, nor any injury have been occasioned to the plaintiff's carriage or to his sons; but that the plaintiff's son drove the carriage so negligently and improperly, that it ran and struck against the defendant's coach, and by means thereof, and without any carelessness or improper conduct of the defendant by his servant, the defendant's coach ran and struck against the plaintiff's carriage, whereby the supposed damages in the declaration mentioned were occasioned: so that if any damage was occasioned to the plaintiff's carriage or to his sons, it was occasioned by the carelessness and negligence of the plaintiff's son so driving his carriage; without this, that the defendant, by his servant, so carelessly and improperly drove his coach, that by and through his carelessness and improper conduct in that behalf, the defendant's coach struck against the plaintiff's carriage, in manner and form, &c.; concluding to the country. The plea was held bad on special demurrer. Lord Abinger, C. B., said: "I am of opinion that this plea is bad. The principal ground on which a special plea amounting to the general issue has been held bad on special demurrer, is, that it contains superfluous and unnecessary matter. As this plea concludes to the country, this forms the only objection to it; if it had concluded with a verification, it would have been more vicious, because it would drive the plaintiff, in his replication, to select some particular fact to take issue upon." Gough *v.* Bryan, 2 M. & Welsb. R. 770.

country.[1] In Smith *v.* Smith, in Massachusetts,[2] the action was an action on the case for an injury done to the plaintiff's horse by a wood-pile, which the defendant had placed in the highway; and it was held, that, as the plaintiff did not use ordinary care, by which the obstruction might have been avoided, he could not maintain the action. The defendant contended, that the plaintiff did not use ordinary care, that the wagon in which he was driving in descending the hill on which the accident happened, was overloaded; that he did not drive skilfully, and that he did not put a shaft girth on. Parker, C. J., in giving the opinion of the Court, said: "It would seem, at first, that he who does an unlawful act, such as incumbering the highway, should be answerable for any direct damages which happen to any one who is injured, whether the party suffering was careful or not in his manner of driving or in guiding his vehicle, for it could not be rendered certain, whether, if the road were left free and unincumbered, even a careless traveller or a team driver would meet with any injury. But on deliberation we have come to the conclusion, that this action cannot be maintained, unless the plaintiff can show that he used ordinary care; for without

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[1] See *ante*, n. 1 to preceding section; Brownell *v.* Flaggler, 5 Hill, (N. Y.) R. 282, and the cases there cited; Harlow *v.* Humiston, 6 Cow. (N. Y.) R. 191; Noyes *v.* Morris, 1 Verm. R. 353; Burckle *v.* New York Dry Dock Company, 2 Hall, (N. Y.) R. 151; Lane *v.* Crombie, 12 Pick. (Mass.) R. 176; Monroe *v.* Leack, 7 Met. (Mass.) R. 274; Parker *v.* Adams, 12 Met. (Mass.) R. 415; Beers *v.* Housatonic Railroad Co. 19 Conn. R. 566. The case of Butterfield *v.* Forrester, (*ante*, § 556,) was cited and relied on by the Court of Appeals of South Carolina, in a case in which the judgment of the Court was, — that where a *slave* of the plaintiff, endowed with ordinary intelligence, and acquainted with the nature and manner of using a railroad, voluntarily laid himself down on the road and went to sleep, amidst grass so high as to obstruct the view at some distance, and in this situation, without any fault of the engineer, the engine going at its ordinary speed, passed over the body and killed the slave, the plaintiff could not recover against the company for the value of the slave killed. Felder *v.* Cincinnati and Charleston Railroad Co. 2 M'Mull. (S. C.) R. 404.

[2] Smith *v.* Smith, 2 Pick. (Mass.) R. 621.

that, it is by no means certain that he himself was not the cause of his own injury. The party who obstructs a highway is amenable to the public in indictment, whether any person be injured or not, but not to an individual, unless it be shown that he suffered in his person or property by means of the obstruction; and where he has been careless, it cannot be known whether the injury is wholly imputable to the obstruction, or the negligence of the party complaining. And, considering the indulgence shown by the public to the citizens, in many places, to occupy a part of the highway for temporary purposes, leaving ample room for travellers with ordinary care to pass uninjured, the principle which requires that degree of care in order to entitle a party to damages, may be deemed salutary and useful. That such is the law, we are fully satisfied from an examination of the authorities cited." [1]

§ 558. Where a person travelling with a horse and wagon might, from an eminence in the road, have seen that a causeway at a considerable distance, which he intended to pass over, was covered with water, but when he descended the hill the causeway was out of sight until he had proceeded too far either to turn back or to go on with safety, it was held, that hitherto he was not guilty of negligence; and, as he then used ordinary care in endeavoring to extricate his horse from the danger, but without success, he was held entitled to recover for the loss of the horse, which was drowned. The jury, in this case, were satisfied from the evidence, that the loss of the horse was owing to the defect in the causeway, and that no mismanagement or negligence on the part of the plaintiff concurred in the loss.[2]

§ 559. It is obvious, that cases of alleged mutual neglect,

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[1] The learned Judge laid much stress upon the decision in Butterfield *v.* Forrester, 11 East, R. 60, and cited in the preceding section.

[2] Thompson *v.* Bridgewater, 7 Pick. R. 188.

like those above-mentioned, must be determined by the jury. In an action by the owner of a coach and horses against the driver of another coach, for driving the wheels of his coach upon one of the horses attached to the plaintiff's coach; it was contended for the defendant, that, according to the evidence, the action could not be maintained as the driver of the plaintiff's coach was himself in fault, as he and the defendant were mutually running and cutting each off, to prevent each other going ahead. The Court sustained this objection, and instructed the jury, that as the plaintiff's driver was in fault, in the manner stated by the defendant's counsel, the action could not be sustained, and directed them to give a verdict for the defendant; which they did. To these instructions of the Court, the plaintiff alleged exceptions, and a new trial was granted, because the direction of the Court to the jury assumed a fact as proved, which should have been left to them on the evidence. The view of the case taken by Wilde, J., in giving the opinion of the Court, was thus: — "We are of opinion, that the fault of the plaintiff's driver was not satisfactorily proved. All that is proved is, that he *had been* in fault *previously* to the transaction complained of. But this was no justification for the defendant in the commission of the like fault. And, it appears by the evidence reported, that the injury complained of was solely caused by the misconduct of the defendant. He drove the plaintiff's horses into a snow drift; and it was testified by the witness, that Littlefield, the plaintiff's driver, tried to avoid him all he could." [1] This case, therefore, establishes the point, that evidence that the drivers of two coaches on the same route mutually attempted several times to intercept each other's progress, by "cutting each other off," is not sufficient to prove that, in a subsequent collision on the same trip, they were both in fault.

§ 560. In an action for injuries sustained by a collision,

[1] Monroe *v.* Leach, 7 Met. (Mass.) R. 274.

the declaration alleged, that the defendant drove a *barouche* on the public highway, against another *barouche*, the property of the plaintiff, in which he was then riding, and thereby broke to pieces the *barouche* of the plaintiff; by means of which the plaintiff was thrown upon the ground, and was much bruised and wounded. On the trial, the plaintiff claimed to have proved, that at the time alleged in his declaration, he, with two females, one of them his daughter, was riding along the public highway in the town of *Wethersfield*, in a *southerly* direction, in a barouche drawn by one horse, which was driven by the plaintiff; that the defendant, riding with one female, upon the same highway, in the same direction, in a wagon drawn by one horse, and driven by the defendant, overtook the plaintiff's barouche near a brick school-house, about one quarter of a mile from the place where the injury complained of happened; that when the defendant so overtook the plaintiff, the plaintiff, for the purpose of increasing the speed of his horse, and keeping out of the defendant's way, either struck, or snapped his whip at, his, the plaintiff's horse, in consequence of which it moved forward more rapidly than before; that the defendant applied his whip to his, the defendant's horse, in repeated instances, and thereby greatly increased its speed, and the defendant several times attempted to pass by the plaintiff, but as the defendant's horse approached the plaintiff's, moving with much rapidity, the plaintiff's horse became excited, and the plaintiff could not hold it in, and both moved forward at a very rapid rate, the defendant urging on his horse with repeated strokes of the whip, the defendant's horse being sometimes directly behind, and at others by the side of the plaintiff's barouche, the plaintiff's horse being at all times in advance of the defendant's, until the injury complained of happened; that as soon as the plaintiff was able so to do, he turned his horse and barouche aside, so as to give the defendant an opportunity of passing the plaintiff, without doing him or his property any injury, and, at the time when the injury happened, had so far turned out of the highway as to leave

the whole, or nearly the whole, of the travelled path to the defendant, and to afford the defendant every opportunity and facility which was necessary or desirable to pass by the plaintiff's barouche and horse, without in any way coming into collision with either; and that the defendant might have so done, if he chose; but that the defendant, without any necessity whatever, at the place where said injury happened, drove his wagon against the plaintiff's, and thereby overset the same, and caused the injury complained of. The defendant offered evidence to prove, and claimed that he had proved, that he lived in the city of *Hartford*, and was riding in said wagon driven by him, being a light wagon, late in the afternoon of the day on which the injury complained of happened, to the *south* part of *Wethersfield*, with an intention of returning home the same day; that he passed the plaintiff, who was riding in the same direction, in his barouche, which was a heavy barouche, and heavier than the wagon of the defendant, near the said brick school-house; that he, the defendant, then passed the plaintiff, whereupon the plaintiff whipped up his horse, put him to great speed, and passed the defendant; that the plaintiff kept his horse and barouche before the defendant, turning to the right and left before him, as he turned to the right and left to pass on, thus keeping the defendant back for a considerable distance, and hindering him in his progress; that the defendant, for the purpose of passing the plaintiff, left the travelled path, and turned across a gutter, by the side thereof, into the side of the highway; that the plaintiff entered into a race with the defendant; that the plaintiff and defendant came together side by side, in a short time, upon a certain stone bridge, when the defendant passed the plaintiff, on his right, both continuing to drive with great speed, until at the distance of about twelve rods from said bridge, the plaintiff's left trace broke, and also the left shart of his barouche, and his said barouche then upset, in consequence of running off from the travelled path into the gutter by the side thereof, and threw out the plaintiff; and that in that mode the injury sustained by the plain-

tiff was caused : all which was denied by the plaintiff. The defendant claimed from the testimony, that the plaintiff had not proved, that the defendant did drive his wagon against the plaintiff's barouche, or cause it in any wise to come in collision therewith, or occasion the injury complained of; and if so, that the plaintiff was not entitled to recover. And the defendant also claimed, that if he, the defendant, through negligence, had driven his said wagon against the plaintiff's barouche, and thereby overset it, and caused the injury complained of; yet that the plaintiff was also guilty of the misconduct claimed to have been proved by the defendant concurring to produce the result, and was, therefore, not entitled to recover for such injury. The plaintiff claimed, that he had been guilty of no negligence or misconduct on his part, and that said injury happened entirely through the negligence or misconduct of the defendant; and that if the plaintiff had been guilty of negligence on his part, the defendant drove his wagon against the plaintiff's barouche, and overset it, and caused the injury complained of, intentionally; and if not intentionally, through gross negligence on the part of the defendant; all of which the defendant denied; and the plaintiff claimed, that in either of these events or cases, he was entitled to recover. And the parties respectively requested the Court to charge the jury in conformity with their several claims. The Court charged the jury, that if the defendant did not drive his wagon against the plaintiff's barouche, and thereby cause the injury complained of, the plaintiff was not entitled to recover in this suit; but that if the defendant, either intentionally, or through gross negligence on his part, drove his wagon against the plaintiff's barouche, and thereby overset it, and caused the injury complained of, the plaintiff was entitled to recover; and that if neither of these was the case, but the defendant was guilty of a want of ordinary and reasonable care and prudence, and thereby drove his wagon against said barouche, and overset it, and caused the injury complained of, the plaintiff was entitled to recover, unless there was also fault or negli-

gence on his part, which concurred in producing the injury; but if the plaintiff, on his part, was guilty of any fault or negligence, and such fault or negligence concurred in producing the injury, he was not entitled to recover. The jury returned a verdict for the plaintiff, and a motion for a new trial, on the ground of a misdirection, was denied. Storrs, J., who gave the opinion of the Court, said: — "The plaintiff claimed, that the injury occurred entirely through the negligence of the defendant, without any negligence on his part; and also, that, if the plaintiff was guilty of negligence, the defendant drove his carriage against the plaintiff's, by design or gross negligence, and thereby caused the injury; and that in either of these events, the plaintiff was entitled to recover. This claim as to the effect of negligence on the part of the plaintiff, was evidently intended merely to meet an anticipated claim, by the defendant, of such negligence; but as such a claim was not made by the defendant, it was unnecessary to notice it in the charge; and that part of the charge which was predicated on the supposition that there was concurring fault or negligence in the plaintiff, might properly have been omitted, either as applicable to gross negligence, or a want of ordinary or reasonable care and prudence on the part of the plaintiff. The omission of the Court to qualify the effect of negligence on the part of the defendant, by stating the effect of negligence in the plaintiff, could not have injured the defendant, since the facts as claimed by him to be proved, called for no such qualification. The charge, therefore, as applicable to the case, was unexceptionable. Whether, or under what circumstances, the gross negligence of the defendant would be excused, by concurring negligence on the part of the plaintiff, in cases of injuries occasioned by collision, it is unnecessary in this case to consider; and on a subject where it is so difficult to lay down general principles without qualification, and where it would be hazardous to attempt to point out with precision all those qualifications, we do not wish to be understood as expressing any opinion not required by the case before us."

§ 561. The general rule of law in respect to negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove his horses and wagon against and killed an ass, which had been left in the highway fettered in the forefeet, and thus unable to get out of the way of the defendant's wagon, which was going at an immoderate pace along the road; it was held, that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. For, as the defendant, said Lord Abinger, might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there. Although, said Parke, B., the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief; and were this not so, a man might justify the driving over goods left on a public highway, or even of a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.[1] And, therefore, a

[1] Davies *v.* Mann, 10 M. & Welsb. R. 545. In Brownell *v.* Flaggler, 5 Hill, (N. Y.) R. 282, it was held, that where there had been mutual neglect, the plaintiff might recover in an action on the case, if the evidence showed intentional wrong on the part of the defendant. The above case of Davies *v.* Mann was cited by Lord Denman, C. J., in a case in which it was held, that, if property, (as oysters) be placed in the channel of a public navigable river, so as to amount to a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing; for an individual cannot abate a public nuisance if he is not otherwise injured by it than as one of the public; and, therefore, the fact, that such property was a nuisance is no excuse for running upon it negligently. And, the learned Judge said, that "as a general rule of law, every one, in the conduct of that which may be harmful to others if misconducted, is bound to the use of due care and skill; and the wrong doer is not without the pale of the law for this purpose." May. of Colchester *v.* Brooke, 7 Ad. & Ell. R. (N. S.) 339.

passenger in a public conveyance who has been injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury.[1]

§ 562. The doctrine, that a plaintiff who has contributed to an injury occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. Where, therefore, the defendant's servant left a horse and cart unattended in a public street, and the plaintiff, a child under seven years of age, during the driver's absence, climbed on the wheel, and other children urged forward the horse, whereby the plaintiff was thrown to the ground and the wheel fractured his leg; it was held, that, on these facts, the jury were justified in finding a verdict for the plaintiff, if they were of opinion that there was negligence on the part of his servant. And it was also held, that the coöperation of third parties to the injury was not a ground of defence, if the means of injury were negligently left where it was extremely probable that they would be set in motion.[2]

§ 563. (8.) *Their Duty to avoid Injury to Foot-Passengers.*] All persons have a right to walk in a public highway, if they observe reasonable care to avoid carriages; and they are entitled to the exercise of reasonable care on the part of persons driving carriages along it. Thus, in an action of trespass for injuring the plaintiff by driving a cart against him, it appeared that the plaintiff was walking in the carriage way in the neighborhood of London about ten o'clock in the evening,

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[1] Thoroughgood *v.* Bryan, 18 Law Journ. 336, and reported in Law Rep. (Boston) for July, 1850, p. 156.

[2] Lynch *v.* Nurdin, 4 Per. & Dav. R. 672, and 1 Adol. & Ell. R. (N. S.) 29.

when the defendant, who was driving a taxed cart, turned out from behind a postchaise and drove against the plaintiff, and knocked him down. It was held, that the plaintiff was entitled to recover. It was, however, proved, that the *foot-path* was in a bad state, and seldom used; but Denman, C. J., observed: — "A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not, especially at night, when carriages are passing along." [1] It is quite clear, at all events, that a foot-passenger has a right to *cross*, and that persons driving carriages along the road are liable if they do not take care so as to avoid driving against the foot-passenger who is crossing the road.[2] If a driver of a vehicle, therefore, cannot pull up because his reins break, that will be no ground of defence, as he is bound to have proper tackle.[3] So when a horse, being frightened, runs away, and damage is done, it is no ground of defence that the chain-stay of the cart to which the horse is attached breaks, and thus frightens the horse.[4] If a horse and carriage are left standing in a street, and without any person to watch them, the owner is liable for any damage done by them, although it is occasioned by the act of a passer-by, in striking the horse; for if a man chooses to leave a horse and carriage standing in the street, he must take the risk of any mischief that may be done in consequence.[5] In

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[1] Boss *v.* Litton, 5 C. & Payne, R. 407.

[2] Cotterill *v.* Starkey, 8 C. & Payne, R. 691; and see Wakeman *v.* Robinson, 1 Bing. R. 213. In the Superior Court of New York, January 5, 1849, there was an action to recover damages for injuries received by the plaintiff by one of the defendant's stage-coaches. The plaintiff, an aged lady (upwards of seventy,) while *crossing*, one afternoon, the *third avenue*, was run over by one of the before-mentioned coaches, and had her arm broken. The verdict in her favor was for $ 1500. Reported for the Journ. of Comm. of January 6, 1849.

[3] Cotterill *v.* Starkey, *ub. sup.*

[4] Welsh *v.* Lawrence, 2 Chitt. R. 262; and see Smith *v.* Smith, 2 Pick. (Mass.) R. 621.

[5] Illige *v.* Goodwin, 5 C. & Payne, R. 190. In this case the plaintiff was a china-man in St. Paul's Church-yard, London; and the cart of the

such case (and the horse be unfastened) the owner of the animal is responsible to any person who is injured thereby, even if the habits of the animal are such as to induce the belief of safety in so leaving it; and evidence of reason for such belief, in an action for an injury sustained in consequence of such negligence, if given in the cause, must be disregarded by the jury.[1]

§ 564. But, according to the doctrine which has already been laid down, applicable to collision of carriages, &c.[2] whenever an action is brought for an injury to a person in crossing a road or street by driving against him and by knocking him down, the jury must be satisfied that the injury was attributable to the negligence of the driver, and to that *alone*, before they can find a verdict for the plaintiff; and if they think that the injury was occasioned, *in any degree*, by the improper conduct of the plaintiff in crossing the road in an incautious and imprudent manner, the defendant will be entitled to a verdict.[3] Thus, if a person in a public street in a city, sees an omnibus coming, however furiously, and he will be reckless and headstrong enough to try to cross the street, and is run over, he cannot recover in an action against the proprietors of the omnibus, as no one has a right of action, if he meets with an accident which by ordinary care he might have avoided.[4]

§ 565. In Wynn *v.* Allard, in Pennsylvania,[5] it appeared that the plaintiff was walking in the middle of one of the most frequented streets of the town of Wilkesbarre, in that State, where there were sidewalks for footmen, when the

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defendant (a scavenger) backed against the window of the plaintiff's shop, and broke a quantity of china.

[1] Overington *v.* Dunn, 1 Miles, (Penn.) R. 39.

[2] See *ante*, § 556, *et seq.*

[3] Hawkins *v.* Cooper, 8 C. & Payne, R. 475; Wolf *v.* Beard, Ib. 373.

[4] Wolf *v.* Beard, *ub. sup.*

[5] Wynn *v.* Allard, 5 Watts & S. (Penn.) R. 544.

defendant, in driving his horses in a sleigh rapidly along, ran against him and injured him, for which he brought an action of trespass. On the trial, the plaintiff offered to prove, that at the time of the occurrence the defendant was intoxicated. The defendant objected to the evidence, and the Court rejected it, and sealed a bill of exceptions at the instance of the plaintiff. The Court below instructed the jury, that if the injury done to the plaintiff was a consequence of the negligence of the defendant alone, he was entitled to recover damages; but if it was occasioned partly by the negligence and carelessness of both parties, the plaintiff was not entitled to recover. This direction, and the rejection of the evidence mentioned, were the subjects of the errors assigned. *Per Curiam*, — "The direction was right; and if there was error, it was on the part of the jury. The principle, that there is no recourse by action for an injury which is the consequence of negligence on both sides, was laid down by this Court in Simpson *v.* Hand,[1] which was a case of negligence in the collision of ships. But the law of the particular case was laid down in this instance, by the Court below, in exact conformity to the direction of Mr. Justice Alderson, in Pluckwell *v.* Wilson,[2] that a person who leaves the ordinary side of the road is bound to use more care and diligence, and to keep a better look-out to avoid concussion than would be requisite if he were to confine himself to the proper side. It was for the jury, therefore, to say, under all the circumstances, whether the plaintiff was chargeable with negligence, having left the sidewalk, in not looking behind as well as before, to avoid contact with persons riding or driving in the middle of the street. If he was, the defendant would be answerable only for negligence so wanton and gross, as to be evidence of voluntary injury. But the evidence of intoxication ought to have been received; not because the legal consequences of a drunken man's acts are different from

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[1] Simpson *v.* Hand, 6 Whart. (Penn.) R. 320.

[2] Pluckwell *v.* Wilson, 5 C. & Payne, R. 379, and cited *ante*, § 556.

those of a sober man's acts, but because, where the evidence of negligence is nearly balanced, the fact of drunkenness might turn the scale, inasmuch as a man partially bereft of his faculties would be less observant than if he were sober, and less regardful of the safety of others. For that purpose, but certainly not to inflame the damages, the evidence ought to have been admitted." Judgment was reversed, and a *venire de novo* awarded.

§ 566. (9.) *Their Duty to avoid Injury to Property on the Way-side.*] It is the duty of the proprietors of railroads and steamboats, and of their agents and servants, in the transportation of passengers as well as of goods, so to manage their *fires*, while their locomotives or boats are passing buildings on the route of travel, that no fire shall be communicated to such buildings. Owners of land on the shore of a river or lake, or of land adjoining the track of a railroad, are not prohibited from building thereon, and they are so far entitled to protection from persons lawfully passing the same with vessels or carriages propelled by steam, as to be secured against such a want of proper precaution on their part, the consequence of which is to set the buildings on fire. In an action for injuries so happening to buildings by the owner of them, it is competent for him to prove that experienced persons were accustomed to use precautions which the defendants neglected. Persons erecting buildings in places such as above-mentioned, though they assume the risk of more than ordinary danger from accidental fires, they do not assume the risk of another's *tortious negligence*.[1] It seems to be the doctrine in this country, that negligence being the gist of the action in these and like cases, it must be proved, and the burden of proof is on the plaintiff; that the defendant's fire being lawfully kindled, it being an element applied to many valuable and useful purposes, and may become destructive from causes not sub-

[1] Cook *v.* Champlain Transportation Company, 1 Denio, (N. Y.) R. 91.

ject to human control, the fact that an injury has been done to others, is not in itself evidence of negligence. Thus, in an action for injury done to the plaintiff's land and fences, alleged to have been occasioned by the defendant's carelessness in setting a fire on his own land, the burthen of proof, it was held, was on the plaintiff to show that the injury was caused by the neglect or misconduct of the defendant.[1] Again, where a locomotive, belonging to a railroad company, drawing a train of cars, was passing, some sparks from the smoke-pipe passed directly therefrom to a roof of a building of the plaintiff standing eighteen inches from the side of the road, whereby the building was set on fire and consumed; it was held, in an action against the company, that the company was not liable.[2] One of the facts deserving of notice in this case is, that the plaintiff placed his building in the position it was after the road was built; but it is apprehended that the owner might have so built in close proximity to the railroad, and although the house would be more exposed than it would be at a greater distance, yet this does not exempt the company's servants from the obligation of care, nor screen the company from the consequences of their negligence.[3]

§ 566 *a*. In England, the fact that premises have been set on fire by sparks emitted from a passing railroad engine, it seems, is *primâ facie* evidence of negligence on the part of the company, rendering it incumbent on the company to show that some precautions had been adopted by them reasonably calculated to prevent such accident. Thus, where it appeared in evidence, in an action against a railroad company for setting fire to a building near the road by sparks of fire having escaped from the company's engines, that shortly

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1 Bachelder *v.* Heagan, 6 Shep. (Me.) R. 32.

2 Burroughs *v.* Housatonic Railroad Co. 15 Conn. R. 124. See also Maule *v.* Wilson, 2 Harring. (Del.) R. 493.

3 Cook *v.* Champlain Transportation Co. *ub. sup.*

after the engine had passed near to where the building was, the latter was observed to be on fire; that sparks or ignited matter had been seen on various occasions to be emitted by the company's engines; that the emission of sparks depended on the rate at which the engines were impelled, having reference to their power, and there were other modes by which it could be prevented; it was held, that the case showed a *primâ facie* case of negligence, for which the company was responsible.[1]

§ 567. Cases, therefore, of damage done to buildings by sparks of fire, or other igneous matter from the engines of steamboats, or locomotives on railroads, in ordinary use, are proper for the jury; who must be satisfied that *every proper precaution was observed to avoid such damage.* In an action against a railway company, the declaration stated, that the defendants, by their servants, so carelessly, negligently, and improperly managed their steam-engine, and the fire therein contained, that through such negligence, &c. divers sparks and portions of said fire passed from the steam-engine of the defendants, to and upon a certain rick of beams of the plaintiff, standing in a field near the said railway, which, by means thereof, became ignited and consumed. The plea was "not guilty;" and in a special case stated for the opinion of the Court under a Judge's order, it was stated that the plaintiff had erected the rick about eleven yards from the rails of the railway; that the engines and boiler used upon this railway were such as are usually employed on railways, and were used at the time of setting fire to the rick, in the ordinary manner, and for authorized purposes. It was held, that upon this statement there was evidence for the jury on the question of negligence in the defendants, and that they were not entitled to a non-suit; and consequently that the case was improperly stated for the opinion of the Court.

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[1] Piggot *v.* Eastern Counties Railway Co. 15 Law Journ. N. S. 255; and 10 Jur. 571.

Maule, J., said, — "The only question of law here is, whether, upon this statement of the evidence, the plaintiff ought to be nonsuited. I think clearly not; because if the case went to the jury, *there is evidence in which they might find negligence in the defendants.*"[1]

§ 568. (10.) *The Degree of their Responsibility.*] We have already endeavored to show the difference in respect to the degree of responsibility, between common carriers of passengers and common carriers of goods; and, in so doing, it was stated to be well established, that the former are not,

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[1] Aldridge *v.* Great Western Railway Co. 2 Nich. & Hare, Cases relating to Railways and Canals, 852. One who is exercising a public trade or business which requires the use of a steam-engine, is liable for any injury to another in consequence of its insufficiency. Spencer *v.* Campbell, 9 Watts & S. (Penn.) R. 32. It has been recognized as law in many ancient decisions in England, that an action lies for any act done by a man in using his own property, whereby the rights of another are injured, unless such act be altogether inevitable and beyond his control. In one instance, the action was for so negligently keeping a *fire* in a field, that it communicated to the plaintiff's adjoining close, and burnt his heath. After verdict for the plaintiff the defendant moved in arrest of judgment, and it was said, — "That in fact in this case the defendant's servant kindled the fire by way of his husbandry, but that a wind arose and drove it into the plaintiff's field;" and the Court said, — "The fire in his fields is *his* fire as well as that in his house. He made it and he must see that it does no harm, and answer the damage if it does. *Every man must so use his own as not to hurt another;* but if a sudden storm had rose which he could not stop, it was matter of evidence, and he should have shown it. Tuberville *v.* Stamp, 1 Lord Raym. R. 264; 1 Salk. R. 13. That cases of this sort fall within the general rule of law which requires that a man shall so use his own property as not to injure or destroy that of another; and that they are neither cases of contract or bailment, see Vaughn *v.* Menlove, 4 Scott, R. 244, recognizing the doctrine in Tuberville *v.* Stamp, *ub. sup.* In conformity to the maxim *sic utere tuo*, &c., where the defendants dug a canal for the purposes authorized by their charter of incorporation, and were obliged to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's house; it was held, that the defendants were liable, though no negligence was alleged or proved. Kay *v.* Cohoes Co. 2 Comst. (N. Y.) R. 159.

like the latter, insurers against all injuries, except by the act of God, or by the public enemy. It was moreover stated, that the nature of their undertaking was to carry "safely and securely," and that although they did not thus impliedly warrant the safety of the passengers at all events, yet that they were bound to the "*utmost*" care and skill in the performance of their duty.[1] The term here used expresses the idea of something beyond *ordinary* care, which the law considers the limit of liability, to which carriers of goods for hire, who are not common carriers, are held.[2] The degree of their responsibility, therefore, to which carriers of passengers are subjected, is not ordinary care, which will make them liable only for ordinary neglect, but *extraordinary* care, which renders them liable for *slight* neglect.[3] It is the danger to the public which may proceed even from slight faults, unskilfulness or negligence of passenger carriers or their servants, and the helpless state in which passengers by their conveyances are, which have induced both Courts of Law and juries, both in England and in America, to bind the rule of the contract *locatio operis*,[4] much tighter than they could be insisted for, on the ordinary principles of that contract.[5] The most inconsiderable departure, therefore, from the important duties which in the preceding pages are laid down

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[1] *Ante*, § 521 – 524.

[2] See *ante*, Chap. III.

[3] See Ingalls *v.* Bills, 9 Met. (Mass.) R. 1; Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181; and see also *ante*, § 523.

[4] See *ante*, § 13.

[5] 1 Bell, Com. 372; Story on Bailm. § 601; 2 Kent, Comm. 600. "They," (carriers of passengers) "are bound to the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest neglect." 2 Greenl. Ev. § 221. Passenger carriers, says Mr. C. J. Shaw, "are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the responsibility upon those who can best guard against it." Farwell *v.* Boston and Worcester Railroad Corporation, 4 Met. (Mass.) R. 49.

and explained, as duties imposed upon passenger carriers, will render them liable for the consequences.

§ 569. That the *onus probandi* is on the proprietor of the vehicle to establish, that there has been no disregard whatever of his duties, and that the damage has resulted from a cause which human care and foresight could not prevent, is well setted.[1] As was laid down by the Court in McKinney *v.* Niel,[2] the upsetting of a stage-coach is *primâ facie* evidence of negligence ; and a passenger, who has been injured, need show nothing more to sustain his action ; and it will then be incumbent on the defendant to show, by way of reducing the damages, or in bar of the action, the circumstances of the case. In Stokes *v.* Saltonstall, in the Supreme Court of the United States, it was admitted that the carriage was upset, and the plaintiff's wife injured ; and it was held, it was incumbent on the defendant to prove that the driver was a person of competent skill, and of good habits, and in every respect qualified for his business ; and that he acted on the occasion in question with reasonable skill, and with the utmost prudence and caution ; and that if the disaster in question was occasioned by the least negligence, or want of skill or prudence on his part, then the defendant was liable.[3] In a case where an accident happened to a passenger on a *railroad*, it was held to be *primâ facie* evidence of negligence ; and Lord C. J. Denman told the jury, that it having been shown, that the exclusive management of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unles *they gave some explanation* of the cause by which it was produced ; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected

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[1] Ibid ; Ingalls *v.* Bills, *ub. sup.* ; Ware *v.* Gay, 11 Pick. (Mass.) R. 106 ; Christie *v.* Griggs, 2 Camp. R. 79.

[2] McKinney *v.* Niel, 1 McLean, (Cir. Co.) 540.

[3] Stokes *v.* Saltonstall, 13 Peters, (U. S.) R. 181.

to give. The learned judge also adverted to the suggestion of a witness, that the speed was too great for the state of the rails at the spot, as furnishing one hypothesis that might account for the event.[1] If a passenger by railroad permits his hand to extend outside of the window of the car, whereby his arm is broken in passing a bridge, the carrier is not liable for the injury; though if the place of accident is one of unusual danger, it is the duty of the carrier, or his servants, to give warning.[2]

§ 570. But as there has been occasion before to say, passenger carriers not being insurers, are not responsible for injuries from accidents where the utmost skill and diligence have been employed; and on this point we would again refer the reader to the case of Ingalls *v.* Bills.[3] Accidents may happen, notwithstanding the utmost care and diligence are exercised to prevent them. The lights which it is the duty of passenger carriers to have in a dark night, may be obscured by fog; the horses may be frightened without the fault of the driver, as by the sudden firing of a gun; or the driver may be deceived by the sudden alteration of objects on the way; or an unexpected obstruction may be encountered; or the driver, from the intense severity of the cold, may, at the time of unexpected danger, become physically incapable of managing his horses, or of otherwise doing his duty. These, and the like cases, are such as will exonerate the proprietors of the vehicle.[4] If a driver of a stage-coach imprudently attempts to pass another on the road, and it appears that the latter did not say or do any thing to provoke a reckless competition, and on the contrary, sought to avoid it, and did all that a prudent and skilful driver could do to avoid the consequences of the recklessness of the former, he is not liable,

[1] Carpue *v.* London and Brighton Railway Co. 5 Adol. & Ell. R. (N. S.) 747.

[2] Laing *v.* Colder, 8 Barr, (Penn.) R. 479.

[3] Ingalls *v.* Bill, 9 Met. (Mass.) R. 1, and cited *ante*, § 536.

[4] Story on Bailm. § 602.

however serious the consequences may have been to his passengers.[1]

§ 571. (11.) *Their Duties and Liabilities in respect to Baggage.*] This is a subject which has already been fully considered and illustrated by the aid of adjudged cases, in the preceding portions of our work, to which it more properly belongs, as constituting the law of the duties and responsibilities of common carriers of goods; and to which we would refer the reader; and the general rules of law on the subject we shall here only summarily recapitulate. Public passenger carriers are bound not only to receive as passengers all persons who offer themselves as such, but, like common carriers of *goods unattended by the owner*, they are bound to receive the articles which the traveller has with him, and which constitute his *baggage or luggage.*[2] We have already seen, that common carriers of passengers, in so far as regards the *baggage* or *luggage* delivered to them by a traveller, are liable to the same extent as common carriers of goods and merchandise;[3] that is, they insure baggage against all losses, whether proceeding from the negligence or misconduct of themselves, their servants, or even all third persons, with the exception of the owner. The only mode, in short, by which they can exonerate themselves from liability in case the baggage of a passenger is lost, is by showing that the loss was occasioned by the act of God or the public enemy,[4] or by the negligence of the owner himself after he has assumed the custody, or direction of it.[5] A public notice, that "all baggage is at the risk of the owner," will not have this effect.[6]

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[1] By the Court, in its charge to the jury in Peck *v.* Niel, 3 McLean, (Cir. Co.) R. 22; Monroe *v.* Leach, 7 Met. (Mass.) R. 274.

[2] As to the duty of common carriers to receive baggage, see the subject treated at large, *ante*, Chap. V., and *ante*, § 524, *et seq.*

[3] See the subject fully considered in Chap. IV. § 107, *et seq.*, and Chap. VIII. § 317, *et seq.*

[4] *Ante*, Chap. VI.

[5] *Ante*, § 113, 140.

[6] See *ante*, § 238, *et seq.*

At the termination of the route of a stage-coach, railroad, or steamboat, the conductors thereof are also bound to make a proper delivery of the baggage to the true owner of it; a duty by no means difficult, as it requires but ordinary care in marking the baggage or luggage, entering it on the way-bill, and delivering a check to the owner.[1] The mere fact, we have seen, that goods, in the form of merchandise, transported by a common carrier of them, have arrived at their place of destination in safety, is no discharge of the carrier from his responsibility until they are delivered to the owner, even if he be not ready at once to receive it; for he is under obligation *to keep* it for a reasonable time, although if it is not called for in a reasonable time, his liability as a common carrier will be reduced to that of an ordinary bailee. The same rule applies in respect to the delivery of articles in the form of, and composing the baggage of a traveller.[2] Like a common carrier of goods, a passenger carrier is also liable, as we have seen, for a *mis-delivery* of baggage, although it is delivered to a wrong person by mistake, and with no fraudulent intent.[3] The responsibility of the carrier for the safety of the baggage commences, of course, with a delivery of it to him, and a delivery at his office or to an agent, is a delivery to him.[4] These general rules have been already laid

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[1] Story on Bailm. § 595; and see the subject of the proper delivery of baggage fully considered, *ante* § 317–325.

[2] *Ante*, § 283–294.

[3] *Ante*, § 321–327, 432.

[4] Since preparing what is contained in the former portion of the work on the subject of the delivery of goods and baggage *to* a carrier (see *ante*, Chap. V.) the author has met with the following case in the Boston Atlas of December 16, 1848. *Court of Common Pleas:* Jordan *v.* Fall River Railroad Company: This was an action brought to recover of the defendant corporation, as common carriers, the value of a travelling trunk and its contents. The evidence was, that the plaintiff engaged a passage from Boston to Bridgewater, on the twelfth day of June last, in the cars of the defendants; and delivered her trunk to the baggage-master of the Old Colony Railroad, who was proved to be the agent of the defendants, for

down and, as we have said, more fully illustrated in preceding portions of the work, which have been referred to in the notes below.[1]

§ 571 *a*. But the liability of passenger carriers for the loss of baggage being equal to that of common carriers of goods, supposes that the company do not protect themselves as to the baggage of the traveller by some special contract on the subject. Some of the railway companies in England have regulations limiting their liabilities in regard to passengers' luggage, the purport of such regulations being, "that the charge made for passengers does not extend to luggage, and that the company will not be answerable for luggage, unless booked and paid for. Such a regulation (and a carrier has a right to make all reasonable regulations,[2]) may be reasonable *where the practice of booking luggage is really carried out, and proper facilities are afforded to the public for complying with it.* Railway companies, and coach proprietors and other carriers, may refuse to take charge of luggage unless booked and given over to their servants in conformity with the general rules which they have found it necessary to establish for conveniently conducting their business. But the case is different when, as frequently happens, the regulation respecting booking is a dead letter, and the general

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the reception of baggage on their road. The plaintiff proved the contents of her trunk, by the person who helped her to pack it. The contents were several valuable ladies' dresses, and other articles of ladies' apparel, amounting to the sum of one hundred dollars and forty-two cents, and the sum of $ 375 in gold coin. The trunk was found after a period of about three months, at the Holliston depot on the Worcester Road, and had then been broken open and the above amount of clothing taken out and all the money. The defendants contended, that a delivery of the trunk to the baggage-master of the Old Colony Road was no delivery to them; and that if it was proved otherwise, they were in no event liable for the money, both of which points the Court ruled in favor of the plaintiff, who had a verdict for the sum of five hundred and twenty-seven dollars and sixty-seven cents.

1 And see the Index, Tit. "Baggage."

2 *Ante*, § 245, 125, 525 *et seq.*

practice is to take charge of passengers' luggage without requiring it to be booked. In this case the regulation is nothing but a notice, the legal effect of which is, to say the least, very doubtful,[1] and which, if the directors think it advisable to issue, they ought to issue *as a notice.* Issued as a *mere notice*, such regulation could have no further effect in limiting the company's liability, than that they may refuse to take charge of passengers' luggage, unless such reasonable regulations as they have found it necessary for their convenience to establish, are complied with. If they do actually take charge of such luggage, they incur the ordinary responsibility of common carriers.[2] But it would appear, that where the company take care to embody the notice in the tickets delivered to every passenger on taking his place, as part of the terms on which they are willing to accept him, this would constitute a special contract on the subject, so that the company would only be liable for negligence.[3]

§ 572. (12.) *Their Liability for the Acts of their Servants and Agents.*] We have seen that passenger carriers are not only personally bound for their own acts and omissions in

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[1] *Ante*, § 238, *et seq.*

[2] Report of the Officers of the Railway Department of the Board of Trade, cited in Walford, Sum. of the Law of Railways, p. 326. See *ante*, § 107–117, 238.

[3] See Parmer *v.* Grand Junction Railway Co. 4 M. & Welsb. R. 752. And see, as to the effect of a special contract, *ante*, § 225. A railway company may also be entitled to a protection more or less extensive in regard of the luggage of passengers, under the provisions of their own act of incorporation; as, for instance, where a railway act provided that the company should not be responsible for any thing taken with him, by a passenger, save articles of clothing of given weight and dimensions. Under a provision of the above kind, the company are exempt from all liability, in respect of goods accompanying a passenger, not being articles of clothing of the requisite weight and dimensions; that is to say, from all liability as carriers; for the clause of course is not a license for the company to deal with such articles at their own free will and pleasure. See Elwell *v.* Grand Junction Railway Co. 5 M. & Welsb. R. 669; and *ante*, § 250, 267, *et seq.*

the transportation of travellers and their baggage, but also for the misconduct and negligence of the agents in their employ. A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, is supported by evidence that the defendant's servant drove the cart.[1] A charge, that the defendant is the owner of the vehicle is supported by evidence that he holds himself out to the world as the owner of it, by suffering his name to remain printed on it, and over the door of the house of business to which it belongs; although it is proved, that he had for some days ceased to be the owner of the vehicle, and was not concerned in the business, having relinquished his business to a former partner.[2]

§ 573. If a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not liable, because he has not, in such case, intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer to say, that the servant acted improperly in the management of it; but the master, in such case, will be liable, because he has put it in the servant's power to mismanage the carriage by intrusting him with it. Therefore, where a servant, having set his master down in Stamford street, was directed by him to put up in Castle street, but instead of so doing, went to deliver a parcel of his own in another part of London, and in returning drove the carriage against an old woman and injured her; it was held, that the master was responsible for his servant's act.[3]

§ 574. It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master

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[1] Brucker *v.* Fromont, 6 T. R. 659.
[2] Stables *v.* Eley, 1 C. & Payne, R. 614.
[3] Sleath *v.* Wilson, 9 C. & Payne, R. 607.

shall be answerable; but the damage must be done while he is actually employed in his master's service; otherwise the servant shall answer for his own misbehavior.[1] The question therefore is, in case of an injury done to the person of a passenger, — who employed the person who did the injury?[2] Any arrangement, we have seen, made between common carriers of goods and their servants or agents, whereby the latter are exclusively to receive the compensation for the conveyance, will not exempt the carriers from responsibility; unless such arrangement was known by the owner of the goods, and he contracts exclusively with the servants and agents.[3]

575. There was an important question as to the liability of a master for the acts of his driver, in Laugher *v.* Pointer,[4] in which, there being a difference of opinion on the bench, the case was directed to be argued before the twelve Judges. The question was, that where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the owner of the carriage was not liable to be sued for such injury.[5] The owner of the carriage would

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[1] 1 Black. Comm. 431, and see *ante*, § 513, 517. A driver sent by the owner of a carriage is his servant, and unless the hirer causes the driver to go beyond the contract of hiring, he will not be liable for the acts of the driver occasioning injury to the carriage or horses. Hughes *v.* Boyer, 9 Watts, (Penn.) R. 556.

[2] Milligan *v.* Wedge, 12 Adol. & Ell. R. 737. Rapson *v.* Cubitt, 9 M. & Welsb. R. 710, is an authority to show that the party injured by the negligence of another, cannot go beyond the party who did the injury; unless he can establish that the latter stood in the relation of a servant to the party sued.

[3] See *ante*, § 77, 85.

[4] Laugher *v.* Pointer, 5 B. & Cress. R. 547.

[5] Held by Abbott, C. J., and Littledale, J., that the owner of the carriage was not liable to be sued for such injury, Bayley and Holroyd, Js., diss. "The able judgments on both sides have," observes Judge Story,

have been liable if he had at all participated in the negligence of the driver, or if the circumstances were such that

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"exhausted the whole learning on the subject, and should, on that account, be attentively studied." Story on Agency, p. 406. They were considered fully by the Court in Quarman *v.* Bennett, 6 M. & Welsb. R. 499, and the Court considered the weight of authority in favor of the view taken by Abbott, C. J., and by Littledale, J. The question in Quarman *v.* Burnett, *ub. sup.*, was treated as similar in its circumstances to the one in Laugher *v.* Pointer, *ub. sup.*, and it was decided in favor of the defendant. In the Court of Queen's Bench, (140,) in Milligan *v.* Wedge, 12 Adol. & Ell. R. 737, Lord Denman, C. J., said, — "I think we are bound by the late decision in Quarman *v.* Burnett, which was pronounced after full consideration." The case before the learned Judge was this: The buyer of a bullock employed a licensed drover to drive it from Smithfield. By the by-laws of London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock (together with others, the property of different persons,) to the owner's slaughter-house. Mischief was occasioned by the bullock, through the carelessness of the boy; and it was held, that the owner was not liable for the injury; the boy not being, in point of law, his servant. "The true test," said Coleridge, J., "is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exist between them, the act of one creates no liability in the other. Apply that here. I make no distinction between the licensed drover and the boy. Suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge; and then the driver does the act. The relation, therefore, of master and servant does not exist between them." By Littledale, J.: "I gave my opinion so fully in Laugher *v.* Pointer, which has since been confirmed by the Court of Exchequer, in Quarman *v.* Burnett, I need say no more now, than that I retain the opinion." It appears that the liability of any one, other than the party committing the wrongful act, rests upon the principle *qui facit per alium facit per se.* In the case of a person riding in his own carriage, with a coachman and horses hired for a day, when the accident complained of took place, (as in Laugher *v.* Pointer, *supra*,) the livery-stable keeper alone stood in the relation of master to the wrong-doer. It was he who had selected the coachman, and the fitness of the servant for his employment was matter of discretion for him. For its exercise he was responsible; of course, had he deputed the exercise of that discretion to another, he would have been equally responsible. But the proposition is clear, no other person than the master of such servant can be liable, on the simple

it could be legally so considered. Thus, in an action against three persons for a joint trespass in killing a horse, by carelessly driving against him in the highway, and it appeared that one of the defendants lent the wagon to the others, and then rode with them by invitation, and after the accident acted as one of the party jointly concerned; it was held, that he was equally liable with the others, and was not to be regarded as a mere passenger.[1]

§ 576. On the principle which has already been considered, viz., that a plaintiff suing for negligence must himself be without fault, and must not himself have contributed to the injury caused in part by the defendant's negligence, — if several servants are engaged at the same work, and one of them is injured by the fault of negligence in which all participated, (the master being absent at the time,) the servant injured cannot recover of the master for the injury; although the act complained of was done under the superintendence of a foreman appointed by the master.[2]

§ 577. In the above case the negligent act was as much the fault of the plaintiff as of the defendant or his foreman;

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ground that the servant is the servant of another, and his act the act of another; and consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant, cannot thereby be rendered liable. It fell from Littledale, J., in Laugher *v.* Pointer, that the law does not recognize a several liability, in two principals who are unconnected; if they are jointly liable, you may sue either, but you cannot have two separately liable. This doctrine is one of general application, irrespective of the nature of the employment. The decision in Rudie *v.* North Western Railway Co., and in Hobbitt *v.* Same, 13 Jur. 659, is an important corollary to both the cases of Laugher *v.* Pointer, and Quarman *v.* Burnett, upon the subject of the liability of a person for injuries occasioned by the negligence of another when employed on his behalf. See Lond. Law Mag. for February, 1850, p. 105, and Law Rep. for April, 1850, p. 626, 634. See *post*, § 667.

[1] Bishop *v.* Ely, 9 Johns. (N. Y.) R. 294.

[2] Brown *v.* Maxwell, 6 Hill, (N. Y.) R. 592.

but suppose the case, that one of the servants employed by a master is injured by the negligent act of another servant in the same employment, and was himself free from all fault, and was, in no sense, a party to the negligence by which he was injured. It was admitted in Priestly *v.* Fowler,[1] in 1837, that there had been no precedent in England for an action by a servant against his master, for any injury received by the former in the regular course of the latter's employment. The case of Farwell *v.* Boston and Worcester Railroad Corporation, decided in 1842,[2] presented the case, where two persons were in the service of one railroad company, whose business was to employ their trains of cars for the transportation of persons and goods for hire; and the two servants were employed for the performance of separate duties, but all tending to one and the same purpose, that of a safe and expeditious transmission of the trains; and the question was directly raised, whether for damages sustained by one of the persons so employed, exclusively by means of the negligence of the other, the party injured had a remedy against the common employer. Mr. C. J. Shaw pronounced the action "one of new impression in our Courts;" and he considered it an argument against such an action, (though not a decisive one,) that "no such action had before been maintained." The case was this: A railroad company employed A., who was careful and trusty in his general character, to tend the switches on their road; and after he had been long in their service, they employed B. to run the passenger-train of cars on the road, B. knowing the employment and character of A. The company, it was held, were not answerable to B. for an injury received by him, while running the cars, in consequence of the carelessness of A. in the management of the switches. The learned Judge, in giving the opinion of the Court, said: That where several persons were employed in the conduct of one common enter-

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[1] Priestly *v.* Fowler, 3 M. & Welsb, R. 1.

[2] Farwell *v.* Boston and Worcester Railroad Corp. 4 Met. (Mass.) R. 49.

prise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding the case in this light, he considered it the ordinary case of one sustaining an injury in the course of *his own employment*, in which he must bear the loss himself. And the learned Judge maintained, that the responsibility which one is under for the negligence of his servant in the conduct of his business, towards third persons, is founded upon another and distinct principle from that of implied contract, and stands upon its own reasons of policy; and the same reasons of policy limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency also forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employers for an indemnity which was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good. That persons are not to be responsible in all cases for the negligence of those employed by them, the learned Judge relied upon the decisions which have established, that underwriters cannot excuse themselves from payment of loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties, as navigators,[1] although they are employed and paid by the owners.[2]

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[1] See Copeland *v.* N. England Marine Ins. Co. 2 Met. (Mass.) R. 440.

[2] On account of the novelty of the question and of the importance of

§ 578. The Supreme Court of New York have expressed their approbation of the decision of the case just considered; and the principle contended for by the learned Chief Justice therein, is supported by Murray *v.* South Carolina Railroad Company,[1] and by Priestly *v.* Fowler, before referred to, in the English Court of Exchequer.[2] The latter case goes

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the principle involved, we here insert the concluding portion of the learned Judge's opinion. "In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears, that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say, that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company — are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole Court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the Court are of opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained."

[1] Murray *v.* South Carolina Railroad Co. 1 McMullen, (S. C.) R. 385.

[2] Priestly *v.* Fowler, 3 M. & Welsb. R. 1.

farther even than that of the case in Massachusetts, inasmuch as it decides that an employer would not be responsible to his servant for injury arising from an improper condition of the vehicle, with the management of which the servant was intrusted. The declaration in this case stated, that the plaintiff was a servant of the defendant; that the defendant had desired and directed the plaintiff, so being his servant, to go with certain goods of the defendant in his, the defendant's *van*, then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such direction, proceeded and was carried by the said van with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded; nevertheless, that the defendant did not use proper care that the van should not be overloaded; in consequence of the neglect of which duty, the van broke down, and the plaintiff was thrown on the ground, whereby his thigh was fractured. It was held, that the action was not maintainable. As it was admitted that there was no precedent for the action, the Court considered it incumbent upon them to decide the question which was presented, upon general principles; and, in so doing, they thought they were at liberty to look at the *consequences* of a decision, the one way or the other. The consequence of holding the master liable, in their opinion, would be serious in the extreme. If, said the Court, the owner of the carriage was liable to his servant for the sufficiency of the carriage, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman. Nor was there any reason, in the opinion of the Court, why the principle should not (if applicable to this class of cases) extend to many others. The master,

for example, would be liable to the servant for the negligence of the chamber-maid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity of these consequences, afforded, in the opinion of the Court, a sufficient argument against the application of the principle which was contended for. The servant is not bound to risk his safety in the service of his master; and in fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him; and which diligence and caution are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.[1]

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[1] In Hutchinson *v.* York, Newcastle, and Berwick Railway Company, the defendants pleaded that the deceased was in their service at the time of his death, and that the accident was caused by the negligence of a fellow-servant. The Court, on demurrer, held, that the plea was good, as it constituted a complete answer to the action by setting out that the deceased's death was caused by the negligence of a fellow-servant; and in accordance with the decision in Priestly *v.* Fowler, and the demurrer was overruled. Hutchinson *v.* York, Newcastle, and Berwick Railway Co., Co. of Exchequer, Dec. 7, 1849; May 22, 1850, reported in Law Reporter, (Boston) for July, 1850, p. 129. But in Ohio there has been, in a case precisely like the case of Farwell *v.* Boston and Worcester Railroad Co., a refusal to apply the principle upon which that, and the case of Priestly *v.* Fowler were decided. Stevens *v.* Little Miami Railroad Co. (Hamilton Common Pleas, Ohio, February Term, 1850.) Law Reporter for June, 1850, p. 74.

§ 579. Although where a party becomes responsible to the public by undertaking a public duty, he is liable to an action and may, like a carrier, be sued in case or assumpsit, even if the injury has arisen from the negligence of his servant or agent; yet a party who has not been privy to a contract entered into with him, can maintain no action upon it. A coach-maker may be liable for a defect in a carriage to the person to whom he sells it, but he is not liable to a passenger who has received injury in consequence of such defect; nor to the driver of it who receives an injury in consequence of its being defective; and as the driver cannot sue the maker of the coach nor the person who employs him to drive it, he is remediless altogether.[1] The case of Winterbottom *v.* Wright,[2] is a case of this sort. In this case A. contracted with the Postmaster General to provide a mail-coach to convey mail-bags along a certain line of road; and B. and others also contracted to horse the coach along the same line; and B. and his co-contractors hired C. to drive the coach. It was held, that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction; and the Judges were unanimously of this opinion. The opinion of Baron Rolfe was as follows: "The breach of the defendant's duty, stated in the declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said

[1] See the opinion of Lord Abinger, in Winterbottom *v.* Wright, 10 M. & Welsb. R. 109.

[2] Winterbottom *v.* Wright, *ub. sup.*

mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word *duty*. If a duty to the Postmaster General be meant, that is true; but if a duty to the plaintiff be intended, (and in that sense the word is evidently used,) there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuriâ;* it is no doubt a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law."

§ 579 *a*. After a railroad company has been incorporated, and an accident has occurred to a passenger on the line in consequence of the negligence of a servant of the company, neither the engine driver nor the superintendent of the traffic has implied authority to contract with medical men to assist the injured person. Such authority may only be inferred from the conduct of the directors on former occasions, in recognizing similar contracts made by their officers; or perhaps from evidence that similar powers were usually exercised by similar agents of similar companies.[1]

§ 580. (13.) *Their Liability as Co-partners.*] That one partner is liable in tort for the acts of his co-partner, in the prosecution of the co-partnership business, as well as upon contracts, is well settled.[2] And, as an action lies against a master for an injury done to another, through the negligence or unskilfulness of his servant, while acting in his employment; so partners are responsible in the same way for the conduct of their servant.[3] The material question is, when

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1 15 Jur. 64, reported in Law Rep. (Boston,) for May, 1849, p. 42.

2 See opinion of Walworth, Chancellor, in Champion *v.* Bostwick, 18 Wend. (N. Y.) R. 175, and also *ante*, § 92–95.

3 Dwight *v.* Brewster, 1 Pick. (Mass.) R. 50.

is a carrier co-partnership constituted ? a question which is to be of course determined in reference to the well established principle of law, that whoever participates in the profits of a trade or business, or has a specific interest in the profits themselves, as such, becomes chargeable as a partner with respect to third persons. Individuals become liable as partners to third persons, either by contracting the legal relation of partners *inter se*, or by holding themselves out to the world as partners; and, to speak correctly, these are the only means of incurring the liability in question.[1] The partnership as to third persons may arise, without the intention of the parties thereto, but by mere operation of law; but only the actual intention will constitute a partnership *inter se*. It seems, that a party connected with a partnership, who receives a compensation for his services graduated by the profits of the business, is not a partner as to third persons; to constitute him such, he must have such an interest in the profits as will entitle him to an *account*, and give him a specific lien or preference in payment over other creditors.[3]

§ 581. The question as to the liability of carrier-partners, has arisen in several instances, in England. "In many instances," says Mr. J. Bayley, "one coach proprietor horses a coach for one stage, another for a second, and so on, and in some instances the man who finds the horses, finds the coachman also. Shall this take away the liability of all the proprietors? Shall it be said, if the coach does an injury upon a given stage, that the proprietor who finds the horses and driver for that stage shall alone be answerable? The horses and driver are found by one to do the work of all; they are employed upon the work, and for the benefit of all;

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[1] Gow on Part. 14, 15; Collyer on Part. 67, § 78, (3d Am. edit.)

[2] Collyer on Part. *ub. sup.* Opinion of Story, J., in Hazard *v.* Hazard, 1 Story, (Cir. Co.) R. 371.

[3] See opinion of Walworth, Chancellor, in Champion *v.* Bostwick, 18 Wend. (N. Y.) R. 175.

and, therefore, all are responsible."[1] In an action on the case to recover damages for breaking the plaintiff's windows, in consequence of the negligence of the driver of the defendant's wagon; it appeared, that the defendant and one Dyson were carriers from London to Gosport, and by an arrangement between them, Dyson horsed the wagon from London to Farnham, and the defendant from Farnham to Gosport; and when the injury happened, the wagon was drawn by the horses and driven by the servant of Dyson, with whose employment the defendant had no concern; and the wagon was the property of the defendant. The plaintiff, it was held, was entitled to recover on the ground, that the defendant and Dyson *were jointly entitled to the profits;* that the wagon was drawn for the benefit of the defendant as well as Dyson; and that the driver was legally the servant of the defendant, though for some purposes, and as between the parties themselves, he was the servant of Dyson alone.[2] Where the plaintiff and the defendant were joint proprietors of a stage-coach running from A. to B., the former providing horses for one part of the road, and the latter for the other, and the profits of each party were calculated according to the number of miles his horses travelled, and the plaintiff received the fares of the passengers, and gave a weekly account of the receipts and disbursements belonging to the coach of the defendant; it was held, that the plaintiff and defendant were partners; and that, in an action by the former against the latter upon a separate transaction, he could not set off a balance due to him upon such weekly accounts.[3] Where the plaintiff agreed with the defendant to convey by horse and cart the mail between N. and B. at 9*l.* a mile per annum, and to pay his proportion of the expenses of the cart, &c.; the money received for the carriage of parcels to be divided between the parties, and the damage occa-

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[1] Laugher *v.* Pointer, 5 B. & Cress. R. 547.

[2] Waland *v.* Elkins, 1 Stark. R. 272.

[3] Fromont *v.* Coupland, 9 Moore, R. 319.

sioned by loss of parcels, &c. to be borne in equal portions; it was held, that this agreement constituted a partnership, and not a mere measure of wages; and that, consequently, the plaintiff could not sue the defendant for the 9*l.* as stipulated.[1]

§ 582. An action on the case was tried at the Oneida Circuit in New York, which was brought against the defendants, *as the owners of a stage-coach*, for an injury sustained by the wife of the plaintiff in being thrown from a wagon in which she was riding, in consequence of a stage-coach belonging to the defendants, through the negligence of the driver thereof, coming in contact with the wagon; and the defendants pleaded the general issue. It appeared on the trial, that the defendants ran a line of stage-coaches from Utica to Rochester, and that the route was divided into sections; a section extending from Utica to Vernon was occupied by one Dodge, one of the defendants; another section extending west, was occupied by one Ewers and others; and the remainder of the route by Champion and Bissell. The business was conducted, and the proceeds of the concern were divided thus: The occupants of each section provided their own carriages and horses, employed their own drivers, and paid the expenses of their separate sections of the route, except the tolls at turnpike gates; and the moneys received as the fare of passengers, after deducting such tolls, were divided among the occupants of the several sections, in proportion to the number of miles of the route run by each. The injury in question occurred on the section of the route occupied by Dodge, the stage-coach which was driven against the wagon was owned by him, and the driver of it was employed by him. The Judge charged the jury, that, upon these facts, the defendants must be considered *partners*, and that they were *all* responsible for any injury occasioned by the negligence of either of the drivers of the coaches on either section

[1] Green *v.* Beesly, 2 Bing. New R. 108.

of the route, as each driver was the servant of all the individuals connected in the business; that the fact, that the occupants of each section employed their own drivers and paid the expenses of their own section, did not discharge them from liability; that a right to a division of the fare received from passengers, after paying the tolls, in proportion to the distance run by the occupants of the respective sections, was an interest in the profits, constituting them partners, and rendering them liable in the action against them. The defendants, on a bill of exceptions to this charge, moved for a new trial, which in the Supreme Court was denied. Nelson, J., in giving the opinion of the Court, said: "Each sharing in the profits of the whole route, and of course of each section of it, it is not only just, but in accordance with well settled principles of law, to hold all responsible for the faithful discharge of their duty; and to respond in damages for any injury which happens from the negligence or unskilfulness of any of the proprietors or their servants. It is just to the public and to themselves. The former have a right to claim the responsibility of all who profit directly by their patronage; and, as to the latter, the loss should be borne by all. The drivers themselves are generally irresponsible men, and so frequently are single proprietors. The public safety and convenience will depend essentially upon the application of the rule of joint responsibility of all the proprietors, who will then see to it that all their co-partners, and all who are employed in the concern, are trustworthy." The judgment was affirmed by the Court of Errors.[1]

§ 583. A line of stage-coaches, in Massachusetts, was run by two persons from Barre through Holden to Worcester and back; and it was agreed that one of them should furnish and maintain horses and coaches, and receive the money paid for the transportation of passengers between

[1] Bostwick *v.* Champion, 11 Wend. (N. Y.) R. 571, and S. C., in error, 18 Wend. (N. Y.) R. 175.

Holden and Worcester, and that the other should do the like between Holden and Barre. They employed a man to drive all the way from Barre to Worcester and back, at a certain sum per month and perquisites; and money was delivered by the plaintiff to this driver to carry from Barre to Worcester; but the driver absconded without delivering it. It was held, that the driver was the servant of the two persons jointly, and that they were jointly liable to the plaintiff for the money. The Court, in giving their opinion, said: "If the driver was the servant of one of the defendants at one end of the line, and of the other at the other, there were two contracts; and this brings us to the general question, whether the defendants were so connected as to be jointly liable for his acts. It is not easy to decide, whether they were interested in the whole line, or each at one end only. It should seem in the outset, that there was but one enterprise, namely, to run a line of stage-coaches from Barre and Worcester and back. The contract between the defendants was not a stipulation that one would run coaches one part of the way, if the other would the other part; but it seems to have been a joint undertaking, and the advertisement was of a stage-coach running from Worcester and Barre and back. Each of the defendants was at the expense of supporting the line at one end of the route; and if the arrangement had been to divide the profits equally or proportionably, there would have been a partnership beyond any doubt. Does it make a difference that they divided the profits according as they were earned at each end? The question is not without difficulty, but on the whole we think they must be considered so far jointly concerned, as to be jointly liable for the driver's act in this particular instance. They jointly hired him, and for a joint object; and the well managing of the business at one end of the line, was of importance to the other."[1]

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[1] Cobb *v.* Abbott, 14 Pick. (Mass.) R. 289.

§ 584. A. B. and C. and D. and E. agreed to run a line of stage-coaches from Albany to Utica; each of the three parties was to run a separate portion of the road, and to furnish his own horses and carriages, at his own expense and risk; but extra expenses for extra carriages were to be paid jointly. A. B. and D. met, and the accounts between the parties were examined and adjusted, when there was found a balance due from D. and E. to B. and C. for moneys received at Albany. It appearing that D. and E. being jointly concerned in running their part of the line, and being generally understood to be partners, E. was held to be jointly chargeable for the money received by D., and for his acts; and that an action for money had and received would lie against D. and E. to recover the balance so found to be due; and there was no such partnership existing between the five persons concerned, as would prevent such a suit. The articles of agreement existing between all the five persons concerned in running the stage, did not at all interfere with the suit. The parties had agreed with each other to run a stage from Albany to Utica, but with distinct and separate interests and rights; and each party had his distinct share of the road.[1]

§ 585. The facts that several persons associate together to run a line of stage-coaches, that they have a general meeting, and that debts are contracted on account of the association by only some of the members of it, are not sufficient to prove a partnership.[2] And the fact that several persons actually subscribe an agreement to pay money for the purpose of establishing a line of stage-coaches — the instrument containing a stipulation that no subscriber should be liable to pay if he chose to abandon his share, and that a refusal to pay should operate as an abandonment of his share —

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[1] Wetmore *v.* Baker, 9 Johns. (N. Y.) R. 306.

[2] Chandler *v.* Brainard, 14 Pick. (Mass.) R. 285.

does not constitute a partnership; and therefore the subscribers who refuse to pay, cannot be charged as partners by those who have paid more than their proportion. In fact, it is difficult to imagine a contract to be more cautiously framed to avoid a partnership than this.[1] If a partnership actually formed for the purpose of running stage-coaches, issue to its members certificates of their shares in the joint stock, containing a provision, that the shares shall not be transferred without the consent of the directors, the person to whom a share has been assigned without such consent, cannot allege himself to be a partner, and compel the company to account. It is indeed settled, as a general principle, that a co-partnership cannot be compelled to receive a stranger into their league, as it is founded in personal confidence.[2] Still, if it appears from the course of business that a special provision, like the one mentioned, has by express or tacit consent, been disregarded, assignments and transfers will be held valid, as regards creditors, although not made in compliance with it.[3]

§ 586. Carriers are sometimes engaged in the transportation of what are called "consignee passengers," that is, passengers who are to be carried to a certain terminus, and then to be delivered to other carriers. There were certain persons engaged as such carriers between the city of New York and various places at the West, by the way of the Hudson River, and the canals and lakes, who entered into an arrangement with other carriers, by which it was mutually agreed, that the former should deliver up their freight and passengers to the latter at Albany, and their down freight at Schenectady, the termini of the railroad; and that the latter should transport the freight and passengers over their road. The contract in respect to the price for

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[1] Clark *v.* Reed, 11 Pick. (Mass.) R. 446.

[2] Kingman *v.* Spurr, 7 Pick. (Mass.) R. 234.

[3] Rainhard *v.* Hovey, 13 Ohio R. 300.

transportation, made between the owners of the goods and the party of the first part, was to govern the compensation of the party of the second part, and they were to be paid in the proportion that thirty miles bore to the whole distance the goods "were transported on the canal;" or rather in proportion that thirty miles bore to the whole distance the goods would have been transported on the canal, had the party of the first part run their boats between Albany and Schenectady, instead of employing the party of the second part to carry between those places. The party of the second part brought an action of assumpsit to recover of the party of the first part for the transportation of freight and consignee passengers over their railroad for the party of the first part in the year 1839; and the defence was, that the plaintiffs and defendants were partners in the transaction in question, and consequently without a balance struck and promise of payment, the plaintiffs could not sue at law. Bronson, J., who delivered the opinion of the Court, was unable to see that this made out a partnership between the parties, there being no community of interest, or division of profits of a joint concern between the parties. He said: "The contracts for transportation were all made between the defendants and the owners of the goods. The plaintiffs had no concern, either for profit or loss, with the river, canal, or lake transportation. There was no general account of profit and loss upon the whole business to be adjusted between the parties. One party might make a profit by the business, while it proved ruinous to the other. In short, the case comes to this: The defendants having undertaken to perform work and labor for third persons, employ the railroad company to do a part of the work for them, agreeing that they will pay the company for its services the same price in proportion to distance which the defendants themselves are to receive. I do not see how this makes out a partnership, *either as between the parties themselves, or in relation to third persons.*" One fact in the case was stated by the learned Judge to be, that the company was to furnish

"warehouse facilities," and pay a portion of the expense of offices at each end of the road. But this, in his opinion, did not alter the nature of the contract.[1]

§ 587. A ship-master having agreed to take the defendant's vessel for the purpose of obtaining employment in the freighting business, engaged to victual her and man her, and pay half of all charges, pilotage, &c., and the defendant engaged to pay the other half, together with eight dollars per month for one man's wages, and to put the vessel in sufficient order for business; and all money so stocked in the vessel, whether for freight or passage or whatever, was to be equally divided between the master and the defendant, each party accounting for the above; it was held, that the master was owner *pro hac vice;* that the contract did not make him and the defendant partners; and that the defendant was not answerable to a shipper of goods which had not been delivered according to the bill of lading.[2] Indeed

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[1] Mohawk and Hudson Railroad Co. *v.* Niles, &c. 3 Hill, (N. Y.) R. 162. A. B. and C. were common carriers from L. to F., a separate portion of the road being allotted to each; and it having been stipulated, also, that no partnership should exist between them. A. for himself, and the other parties, agreed with the Mint to carry coin from L. to F., and afterwards makes another agreement with the Mint to carry other coin to places on the road. It was held, that the parties were entitled to share in the profits of this agreement. Russell *v.* Anstwick, 1 Sim. Ch. R. 54. In Massachusetts it is provided by statute, that when railroads unite, the corporations may contract with each other as to transportation. Any railroad corporation, already, or which may be, created in that State, and any other adjoining State, is authorized to contract with any other railroad corporation created as aforesaid, whose road enters upon or is connected with the road of the corporation so contracting, to do and perform all the transportation of persons and freight upon and over said railroad, upon such terms and conditions as may be mutually agreed by the parties. Supp. to Rev. Laws of Mass. c. 99, s. 1, p. 70.

[2] Cutler *v.* Winsor, 6 Pick. (Mass.) R. 335. See Boardman *v.* Keeler, 2 Verm. R. 297; Harding *v.* Foxcroft, 16 Greenl. (Me.) R. 76. The master and crew of a ship engaged in a whaling voyage, who are to receive, in lieu of wages, a proportion of the net proceeds of the oil which shall be obtained, are not partners with the owners of the ship. Baxter *v.* Rodman, 3 Pick. (Mass.) R. 345.

a partnership, between the defendant and the ship-master in the employment and earnings of the vessel, could not be predicated on the above facts, any more than in all the cases in which the charter of a vessel was agreed to be paid by a portion of the earnings.

§ 588. Ferrymen, we have seen, are common carriers,[1] and the question may sometimes arise whether the owner of a ferry is solely liable for losses and injuries from negligence in the management of the ferry, or whether he is liable in connection with another person with whom he has made arrangements in respect to the management or use of the ferry. B., the owner of a ferry, leased it to F. for two years, in consideration of $1000 paid him by F. in cash; and it was agreed between the parties, that, if the net profits of the ferry did not yield F. $2000 dollars within two years, F. should hold over the term until the profits did yield that sum. It was further stipulated, that if the profits gave more than $2000 within the two years, the surplus should be equally divided between them. It was held, upon these facts, that the agreement did not constitute a partnership in the ferry between B. and F.; and that B. was not liable for losses, by negligence at the ferry, during the term of F.'s tenancy thereof.[2]

§ 589. Several persons acting in connection as passenger carriers, may, as among themselves, by the terms of their agreement in relation to one another, not be partners; and they may thus be liable to each other the same as if their interests were several. But this private arrangement can in no way vary the rights of third persons or the public, legally flowing from the general arrangement, under which they hold themselves out as jointly interested, and by which they participate in the profits of the concern. They would be

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1 *Ante*, § 82, 130.

2 Boyer *v.* Anderson, 2 Leigh, (Va.) R. 550; and see *ante*, § 147.

still liable for an injury received by a passenger, through the negligence of their driver.[1]

§ 590. (14.) *Actions against.*] In considering the different duties of passenger carriers, the first which received our attention was their duty *to receive all persons as passengers who offer to become such.* This duty results from their setting themselves up, like common carriers of goods and merchandise, for a public and common employment for hire; and a breach of it is a breach of the law for which an action lies.[2] The rule is, that if no place be taken in the vehicle, and the carrier refuses to carry a person, with his baggage, who offers himself as a passenger, provided he has room, and the person so offering conforms to the reasonable regulations of the carrier, the declaration should be in *case.* The action was case in Bennett *v.* Dutton,[3] and the declaration alleged, that the defendant was part owner, and driver, of a public stage-coach from Nashua to Amherst, and Francestown; that on the 31st of January, 1837, the plaintiff applied to him to be received into his coach, at Nashua, and to be conveyed from thence to Amherst, *offering to pay the customary fare;* and that the defendant, although there was room in the coach, refused to receive the plaintiff. It is clearly necessary, that it should be averred in the declaration, that the plaintiff was *willing* and *ready* to pay the defendant the amount which the defendant was legally entitled to receive for the receipt and carriage of the plaintiff and his baggage; though it is not necessary that he should make an absolute *tender;* and the general allegations in the declaration would be similar to those of the declaration in an action against a common carrier of goods, for refusing to receive and carry them.[4]

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[1] See opinion of Nelson, J., in Bostwick *v.* Champion, 11 Wend. (N. Y.) R. 572.

[2] See the subject fully considered, *ante*, § 524 – 531.

[3] Bennett *v.* Dutton, 10 N. Hamp. R. 481. The action was case in Jencks *v.* Coleman, 2 Sumn. (Cir. Co.) R. 221.

[4] For the form of the declaration for refusing to receive goods, see *ante*,

§ 591. A passenger in a public conveyance who receives an injury while travelling, in consequence of the negligence or misconduct of the proprietor or of his driver or servant, may at his election sue the proprietor in assumpsit on the implied contract for a safe conveyance, or in case as for the tort.[1] And, as in the instance of carriers of goods and merchandise, if the plaintiff adopts the former form of action, to entitle him to recover, he must prove the liability of all the parties sued;[2] but if he adopts the latter, he may recover against any of the defendants who are liable.[3] Bretherton *v.* Wood was an action on the case against ten defendants as the proprietors of a coach, for injuries sustained by the plaintiff, a passenger, in consequence of negligence in driving, and the jury found a verdict against eight of the defendants, and in favor of the other two; and judgment was entered accordingly.[4] On the other hand, if a declaration be even framed in case, yet if it be *founded on contract*, judgment cannot be given for some defendants, and against others. Such was the case of Walcott *v.* Canfield,[5] where the defendants were the proprietors of a line of stage-coaches, and were sued for not performing their undertaking, *in form* in case; but the suit being in *substance* on the contract, the Court held, that the plaintiff must, in every essential particular, prove the contract as he had alleged it.[6]

§ 592. The plaintiff can recover only on the grounds stated

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§ 418, and that if an *offer* to pay is proved, it need not amount to what is strictly a legal *tender*. Ib.

[1] Knight *v.* Quarles, 3 B. & Bing. R. 102.

[2] *Ante*, § 422, *et seq.*

[3] M'Call *v.* Forsyth, 4 Watts & S. (Penn.) R. 179; *ante*, § 435, *et seq.*

[4] Bretherton *v.* Wood, 3 Bro. & Bing. R. 54.

[5] Walcott *v.* Canfield, 3 Conn. R. 194, and cited more fully *ante*, § 438.

[6] But, on the subject of mis-joinder and non-joinder of parties in actions on the case, and in actions of assumpsit, and as to the distinctive character of the declaration, whether it be, in law, in case, or assumpsit, and as to the pleadings, evidence, &c. in the same, we refer the reader to the preceding Chapter X.

in his declaration; and hence in an action by a passenger for an injury done to him by the overturning of a stage-coach, if the declaration states that the servants of the defendant negligently "drove, conducted, and managed the coach," the plaintiff cannot recover, if the negligence was in sending out an insufficient coach.[1] So if the declaration charges the injury to the passenger to the want of skill and care of the driver, and not to any deficiency in the coach, harness, or horses, proof that the lines were broken, can give no right of recovery to the plaintiff.[2]

§ 593. One of the reasons, as there has before been occa-

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[1] Per Littledale, J., Mayor *v.* Humphries, 1 C. & Payne, R. 251.

[2] McKinney *v.* Niel, 1 McLean, (Cir. Co.) R. 540. Mr. Greenleaf (2 Greenl. Ev. § 222) conceives the following count in *assumpsit* against a passenger carrier for bad management of a sufficient coach, would be good. "For that the said (*defendant*) on —— was the proprietor of a coach for the carriage of passengers with their luggage between —— and —— for hire and reward; and thereupon, on the same day, in consideration that the plaintiff, at the request of the said (*defendant*,) would engage and take a seat and place in said coach, to be conveyed therein from said —— to —— for a reasonable hire and reward to be paid to him by the plaintiff, the said (*defendant*) undertook and promised the plaintiff to carry and convey him in said coach, from —— to ——, with all due care, diligence and skill. (*) And the plaintiff avers that, confiding in the said undertaking, he thereupon engaged and took a seat in said coach and became a passenger therein, to be conveyed as aforesaid, for such hire and reward to be paid by him to the said (*defendant*). But the said (*defendant*) did not use due care, diligence, and skill, in carrying and conveying the plaintiff as aforesaid; but on the contrary so overloaded, and so negligently and unskilfully conducted, drove, and managed said coach, that it was overturned; by means whereof the plaintiff was grievously bruised and hurt, [*here state any other special injuries*] and was sick and disabled for a long time, and was put to great expense for nursing, medicines, and medical aid."

If the injury arose from insufficiency in the coach, or horses, insert at (*) as follows: — "and that the said coach was sufficiently stanch and strong, and that the horses drawing the same were and should be well broken, and manageable, and of competent strength;" — and assign the breach accordingly. See *ante*, § 435, n. 3.

sion to state, why the remedy by the action of assumpsit against common carriers of goods is preferable to that of an action on the case, is, that it survives against the executor or administrator.[1] The principle laid down by Lord Mansfield, in Hambly *v.* Trott,[2] is, that "where the cause of action is money due on a contract to be performed, gain or acquisition to the testator, by the work and labor or property of another, or a promise by the testator *express* or *implied;* when these are causes of action, the action survives against the executor." The distinction clearly is between causes of action which affect the *estate*, and those which affect the *person* only; the former survive *for* or *against* the executor or administrator, and the latter die with the person.[3] The general rule of law is *actio personalis moritur cum personâ*, — a personal right of action dies with the person; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case, *the special damage must be stated on the record*, inasmuch as the Court cannot intend it. Damage subsisting in the mere personal suffering of the testator, and all injuries affecting his life or health, are undoubtedly breaches of the implied promise by the persons employed to exhibit a proper portion of care and skill; but there seems to be no authority to sustain any attempt on the part of an executor or administrator to maintain an action in such case.[4] An administrator cannot have an action for breach of promise of marriage to the intestate, where no special damage is alleged.[5] Neither will an action

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[1] *Ante*, § 435.

[2] Hambly *v.* Trott, Cowp. R. 372.

[3] Per Wilde, J., in Stebbins *v.* Palmer, 1 Pick. (Mass.) R. 71; Orne *v.* Broughton, 10 Bing. R. 353; Grace *v.* Grace, 2 M. & Welsb. R. 190.

[4] See the judgment of Lord Ellenborough, in Chamberlain *v.* Williamson, 2 M. & Selw. R. 408.

[5] Chamberlain, &c. *ub. sup.*

for a breach of promise of marriage, where no special damage is alleged, survive *against* the administrator or executor of the promisor.[1]

§ 594. But where the damage done to the personal estate of the testator or intestate, or to the estate of another by the testator or intestate, in his lifetime, can be stated on the record, that involves a case different from the two cases just above stated. A plaintiff, as administrator, declared that his intestate employed the defendant as his attorney to investigate the title to certain premises which the intestate had contracted to purchase, and that the defendant undertook to do so, and assigned as a breach of the defendant's promise, that he caused the intestate to accept a defective title, whereby the latter was wholly unable to dispose of the premises in question during his life; and the count then went on to allege special damage to the *deceased's personal estate.* To this declaration there was a demurrer on the part of the defendant, in support of which it was attempted to be argued, that the action, though in form *ex contractu*, was in substance *ex delicto*,[2] the breach of promise being no more than a tort arising out of a neglect of duty. The Court were, however, unanimous in their opinion, that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the testator, and an injury to his personal property; the truth of which allegation was admitted by the demurrer; that it made no difference in the case, whether the promise was express or implied, the whole transaction resting in contract; that though perhaps the intestate might have brought case or assumpsit at his election, assumpsit being the only remedy for the administrator, it was necessary that the action should be maintained, or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irre-

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[1] Stebbins *v.* Palmer, 1 Pick. (Mass.) R. 71.

[2] See *ante*, § 436–440.

parable injury. It was further observed, by the Court, that if a man contracted for a *safe conveyance by a coach*, and *sustained an injury* by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear that in his lifetime he might, at his election, sue the coach proprietor in tort or in contract, it could not be doubted that his executor might sue in assumpsit for the consequence of the coach proprietor's breach of contract.[1]

§ 595. It would seem rather clear from the above authorities, that an injury which affects the health or life of deceased persons, and which was occasioned by the negligence or unskilfulness of a passenger carrier, although it is a breach of the implied promise by such carrier to exhibit a proper degree of care and skill, and if stated and proved to be detrimental to the estate of the deceased, is the subject of an action by his executor: yet, as importing a mere personal injury, it is not actionable save by the testator himself. And so of a suit against an executor of the party committing the injury, or of the promisor; if no special damage to the estate of the person injured is alleged and proved, an action does not survive.[2]

§ 596. The question then arises, — what shall be considered a damage to the estate of a person, in cases like the above-mentioned? In Ford *v.* Monroe, in New York,[3] the

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[1] Knight *v.* Quarles, 2 Bro. & Bing. R. 102.

[2] The personal representatives are liable, as far as they have assets, in all the contracts of the deceased broken in his lifetime; and likewise upon such as are broken after his death, for the due performance of which, skill or taste was not required. Per Parke, B., Siboni *v.* Kirkman, 1 M. & Welsb. R. 423. And see Com. Dig. "*Administration*," (B.) But at Common Law no action founded in tort, and in which the plea was "not guilty," is held to survive against the executor or administrator of the tort feasor. See Note to Little *v.* Conant, 2 Pick. (Mass.) R. 527, (edit. 1848.)

[3] Ford *v.* Monroe, 20 Wend. (N. Y.) R. 210.

declaration charged, that by the negligence of the defendant in driving a gig, a son of the plaintiff, of the age of about ten years, was run over and killed; and it was alleged in one of the counts, by way of *special damage*, that in consequence of the occurrence, the wife of the plaintiff became sick, and remained so for a long time, and that the plaintiff was not only *deprived of her society*, but was subjected to great expense in attendance upon her, and in effecting her recovery. Damage was also alleged in another of the counts, as the *loss of the service of the child* for a period of ten years and upwards. The happening of the accident and the sickness of the plaintiff's wife, as alleged, were proved. The Judge instructed the jury, that the only question in the case was, whether the servant had been guilty of *negligence;* that if they should find that he was so chargeable, then the plaintiff would be entitled to recover such sum by way of damages as they should be of opinion *the service of the child* would have been worth to him until he became twenty-one years of age, and also that he was entitled to recover damages occasioned by his wife's sickness, consequent upon the accident. Upon the finding of a verdict for the plaintiff for two hundred dollars, and upon a motion for a new trial, the Court, by Nelson, C. J., said: "The damages were specially laid in the declaration, and were clearly proved to have been the direct consequence of the principal act complained of; they therefore came within the well settled rule respecting *special damage*."

§ 597. So far as regards the *deprivation of the society of the wife*, which was alleged in the declaration in the above case, by way of special damage, it does not appear in the opinion given by the Court, whether they did or did not, consider that by itself a sufficient ground for the plaintiff's recovery. In an action in another case against the proprietors of a stage-coach, on the top of which the plaintiff and his wife were travelling, when it was overturned; whereby the plaintiff himself was much bruised, and *his wife was so*

severely hurt, that she died about a month after in a hospital; the declaration, besides other special damage, stated, that "by means of the premises, the plaintiff had wholly lost, and been deprived of, *the comfort, fellowship, and assistance* of his said wife, and had from thence hitherto suffered and undergone great vexation and anguish of mind." It appeared that the plaintiff was much attached to his deceased wife, and that he, being a publican, had lost the use of her in conducting his business. Lord Ellenborough held, that the jury could only take into consideration the bruises which the plaintiff had himself received, and the loss of his wife's society, and the distress of mind he had suffered on her account, *from the time of the accident till the moment of her dissolution*. The damage, in other words, as to the plaintiff's wife, must stop with the period of her existence.[1]

§ 598. Another ground of special damage alleged in the above case of Ford *v.* Monroe, was for the *loss of service* of the child who was killed, when at the age of about *ten* years, and the jury were instructed that the plaintiff was entitled to such sum, by way of damages, as they thought the service of the child would have been worth if he had arrived at *twenty-one* years of age. But how, it may be inquired, were the jury authorized to suppose that the child would have arrived at the latter age, if he had not been killed in the manner he was? In this respect the charge appears somewhat at variance with the view taken of the law by the Court, in respect of damage by *loss of service*, in Hall *v.* Hollander.[2] The action in that case, was trespass for driving a carriage against the plaintiff's son and servant, whereby the plaintiff was deprived of his son's services as servant, and was put to

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[1] Baker *v.* Bolton, 1 Camp. R. 493. If an action is brought for an injury sustained by the *wife*, (and not by the husband,) the damages are to be given accordingly. The husband must be joined in the action, but the damages are to be given for the injury sustained by her.

[2] Hall *v.* Hollander, 4 B. & Cress. R. 660.

expense in obtaining his cure. The child was two years and a half old, and the plaintiff might have placed him in a hospital, which would not have occasioned any expense, but he preferred having him at home; and hence it was held, that the loss of service was the *gist* of the action, and that the child being incapable of performing any service by reason of his tender age, the action was not maintainable, *particularly* as no expense had been necessarily incurred. "I apprehend," said Bayley, J., "that the *gist* of the action depends upon the capacity of the child to perform acts of service. Here it is manifest, that the child was incapable of performing any service: the authorities upon this point are all one way. In the cases which have been cited, the child being capable of performing acts of service, and living with the parent, would naturally be called upon to perform some acts of service; and it was, therefore, held, that service might be presumed, and that evidence of it need not be given." By Holroyd, J.: "The mere relationship of the parties is not sufficient to constitute a loss of service; and the reasoning in all the modern cases shows that some evidence of service is necessary." Abbott, C. J., said, that the Court were called upon to go further than the principle of the Common Law, that the master may maintain an action for a loss of service, sustained by the tortious acts of another, whether the servant be a child or not; and they were asked to hold, that the action was maintainable, although no service was or could be performed by the child; and that, too, upon a declaration alleging the existence of the relation of master and servant, and the loss of the services by such servant. "Such a decision," said he, "could not be warranted by any former case."

§ 599. The case of Williams *v.* Holland,[1] exhibits a case of recovery of damages for an injury committed by a collision on a highway to the plaintiff's son and servant, but

[1] Williams *v.* Holland, 6 C. & Payne, R. 23.

the age of the son is not stated. In Kennard *v.* Burton, in Maine,[1] it was held, that the father of a minor daughter (*eighteen years* old) might maintain an action against an individual, to recover damages sustained by the plaintiff in the loss of the services of the daughter, by an injury consequent upon a collision between the defendant's wagon by his negligence, and the wagon in which the daughter was riding. The Court, in giving their opinion in this case, are particular in distinguishing it from Hall *v.* Hollander, in which the child was too young to perform any service. The Court also held, that evidence of the complaints of suffering made by the daughter of the plaintiff, after receiving the injury, but during the time when it was material to prove such suffering to have existed, was admissible.

§ 600. In a civil Court, *the death of a human being* cannot, at Common Law, be complained of as an injury, and, as in the above case of Baker *v.* Bolton,[2] it was held, damage must stop at the moment of death. Such has been regarded by the Supreme Court of Massachusetts as the doctrine of the Common Law in Cary and Wife *v.* Berkshire Railroad Co., and Skinner *v.* Housatonic Railroad Co.,[3] in which that Court held, that an action on the case could not be maintained by a widow to recover damages for the loss of her husband, or by a father for the loss of his child, in consequence of the death of the husband or child, occasioned by the carelessness or fault of the agents or servants of a railroad corporation. In delivering the opinion of the Court in these cases, Metcalf, J., observed: "If these actions, or either of them, can be maintained, it must be upon some established principle of the Common Law; and we might expect to find that principle applied in some adjudged case

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[1] Kennard *v.* Burton, 12 Shep. (Me.) R. 39.

[2] Baker *v.* Bolton, *ante*, § 579. See 2 Cro. Eliz. 55; Ib. 770; Wheatly *v.* Lane, 1 Wms. Saund. 216, n. (1).

[3] 1 Cush. (Mass.) R. 475.

in the English books; as occasions for its application must have arisen in very many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. No such case was cited by counsel; and we cannot find any. This is very strong evidence, though not conclusive, that such actions cannot be supported. But it is not necessary to rely entirely on this negative evidence. For we find it adjudged in Baker *v.* Bolton, 1 Camp. R. 493, that the death of a human being is not the ground of an action for damages."

§ 600 *a*. The law so remained in England until a very late period, and was so prior to the statute 9 and 10 Vict. c. 93. By section 1 of that act, it is enacted, that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." By section 2, it is further enacted, "that every such action shall be for the benefit of the wife, husband, parent, and child, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, in such shares as the jury by their verdict shall find and direct." By section 3, the action for damages must be brought within twelve calendar months after the death of such deceased person. It will be observed, that

this statute applies only where death ensues from the particular wrongful act, and does not, therefore, affect the class of cases where a tort is committed which does not occasion death.[1]

§ 601. An act has been passed by the legislature of Massachusetts on the same subject, but very different in its provisions from the one above given; and materially different, in so far as respects the provision in the English act for determining the damages by a jury. The two acts in question are indeed framed on different principles, and for different ends. The English statute gives damages as such, and proportioned to the injury to the husband or wife, parents and children of any person whose death is caused by the wrongful act, neglect, or default of another person; adopting, to this extent, the principle on which it has been attempted to support actions to recover damages for the loss of a husband, or of a child. The statute of Massachusetts is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed *as a punishment* of carelessness in common carriers. And as this penalty is to be recovered by *indictment*, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and

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[1] For a tort committed to the person, it is clear that, at Common Law, no action can be maintained against the personal representatives of the tort-feasor, nor does it seem that the above statute, 9 and 10 Vict. c. 93, supplies any remedy against *executors* or *administrators* of the party who, by his "wrongful act, neglect, or default," has caused the death of another. Broom's Legal Maxims, 710. For the application of the doctrine, under the statute, of Priestly *v.* Fowler, (*ante*, § 578,) see Reedie *v.* North Western Railway Co., Law Reporter for April, 1850, p. 626, and for the doctrine applied under it, to cases of mutual negligence, (*ante*, § 556, *et seq.*) See Armsworth *v.* South Eastern Railway Co. 11 Jur. 75.

heirs, not as damages for their loss, but as a gratuity from the State.[1] Thus the statute is as follows: "If the life of any person, being a passenger, is lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased; but if there shall be no children, the whole to the widow, and if no widow, to heirs according to the law regulating the distribution of intestate personal estate among heirs." [2]

§ 602. In respect to the remedy for the recovery of damages for an injury sustained by collision of carriages, in consequence wholly of the negligence of the driver of one of them, an action of *trespass* may be maintained; and so also may that action be maintained for any injury sustained by a foot-passenger, by being run against by a carriage wholly in consequence of the person driving.[3] In either of these cases the act complained of is *immediate*, and not merely a consequence of the act which occasions the injury; and it matters not, so long as the injury complained of is direct and violent, whether the act which caused it be done intentionally, or through negligence.[4] Thus, where the defendant driving his

[1] Per Metcalf, J., in delivering the judgment of the Court, in Cary and Wife *v.* Berkshire Railroad Co. and Skinner *v.* Housatonic Railroad Co. 1 Cushing, (Mass.) R. 475.

[2] Passed March 23, 1840, Supp. to Rev. Laws of Mass. c. 80, p. 165.

[3] See *ante*, § 563, *et seq.*

[4] 3 Stark. Ev. 1107, (Lond. edit. 1842.) The owner of a ship, being himself on board, and standing at the helm, unintentionally runs her

carriage on the wrong side of the road, when it was dark, drove by accident against the plaintiff's curricle, it was held, that the injury which the plaintiff had sustained, having been immediate, from the act of driving by the defendant, trespass might be maintained.[1] It is a direct trespass to injure the person of another, by driving a carriage against the carriage wherein such person is sitting, although the last mentioned carriage be not the property of, nor in the possession of, the person injured;[2] and where the defendant drove his gig against another chaise, whereby the plaintiff's wife was much hurt and injured, it was held, that an action at the suit of the husband and wife was properly brought in trespass.[3] Where the defendant's horses and wagon were wilfully driven against the horses and wagon of the plaintiff, by which the plaintiff's horses were frightened, and ran and broke loose from their wagon, and they were thereby injured and the harness broken; it was held, that trespass was the proper remedy, and not trespass on the case.[4] The defendant's gig, in which he was driving at a "brisk trot" through a narrow street, came in contact with the plaintiff's horse, which was loose in the street, by which the horse was killed; and the defendant was held liable in an action of trespass.[5]

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against another ship, from unskilful management; the remedy is trespass and not case. Covell *v.* Laming, 1 Campb. R. 497. Trespass, and not case, is the proper action to recover damages for an injury sustained by the negligent driving of the defendant's horse. Waldron *v.* Copper, Coxe, (N. J.) R. 339. And see Vincent *v.* Stinehour, 7 Verm. R. 62; McLaughlin *v.* Pryor, 1 Carr. & Marsh. R. 354. But see *post*, § 606.

1 Leame *v.* Bray, 3 East, R. 593.

2 1 Chitt. Pl. 127.

3 Hopper *v.* Reeve, 7 Taunt. R. 698.

4 Rappelyea *v.* Hulse, 7 Halst. (N. J.) R. 257.

5 Payne *v.* Smith, 4 Dana, (Ken.) R. 497. Where an infant hired a chaise, without the knowledge of his father, and the father ratified the act by directing the infant to pay the hire out of his wages, which belonged to the father; it was held, that the father had such a special property in the chaise as would enable him to maintain trespass for an injury done to it during the term of hire. Boynton *v.* Turner, 13 Mass. R. 391.

§ 603. But *case*, instead of trespass, must always be adopted where the defendant's *servant*, and not the defendant personally, caused the injury by his carelessness, &c.[1] In an action on the case against three defendants, proprietors of a stage-coach, for carelessness and mismanagement of their coach and horses, whereby the coach ran against the plaintiff and broke his leg; it was held, that the plaintiff might maintain *case* against all the proprietors, though he might perhaps have been entitled to bring *trespass* against the one who drove the coach. Holroyd, J., said, that the real ground of the action was the negligence of the defendant who drove, and "they are all responsible for the person appointed to drive, whether the person be or be not one of themselves. They are all responsible as the owners of the coach and horses. Trespass might lie against the driver by reason of his doing the particular act; but still there would be a ground of action against his co-proprietors, and that could *only* be in an action on the case, for they are not by his act made co-trespassers. If case lies against them, it lies against him also as a joint proprietor, if a ground of action remains, after the trespass has been waived." [2]

§ 604. In order to identify the principal with an agent who commits a trespass, it is not sufficient to prove merely that the agent, when he offended, had the conduct of his master's lawful business; for although a principal is responsible for

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[1] 1 Chitt. Pl. 127, (10th Am. Ed.) And see Barnes *v.* Hurd, 11 Mass. R. 57; Campbell *v.* Phelps, 1 Pick. (Mass.) R. 62.

[2] Morton *v.* Harderne, 4 B. & Cress. R. 223. The decision in this case is commented upon and approved by the Court in Wright *v.* Wilcox, 19 Wend. (N. Y.) R. 343, in which the Court say, that in a case of strict negligence, they see no reason why an action will not lie against both jointly. "They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, and the master constructively, by the servant his agent." See also Ogle *v.* Barnes, 8 T. R. 188; Michel *v.* Abestree, 2 Lev. R. 172; Whittemore *v.* Waterhouse, 4 C. & Payne, R. 383.

the negligence of his agent, he is not responsible for his wilful misconduct.[1] If the agent of A. negligently drove the carriage of A. against that of B., the agent would be liable in trespass, and A. would be liable in case for the negligence of his servant;[2] but if the agent in such case *wilfully* drove the carriage of A. against that of B. *without the assent of A.*, the latter would not be responsible.[3] That is, a master is not liable for the wilful trespass of his servant.[4] If the defendant's servant, in driving his master's carriage, wantonly strike the horses of the plaintiff, in consequence of which the carriage of the plaintiff is injured, the defendant is not responsible; but if the servant so strike, although injudiciously, in the course of his employment, and in furtherance of it, the defendant is liable in case.[5] Where a trespass is the natural consequence of the act directed by the master to be done by a servant, the master is liable, although his direction to the servant is to avoid the trespass.[6]

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[1] 3 Stark. Ev. 1111, (Lond. Ed.) 1842.

[2] Morley *v.* Gainsford, 2 H. Bl. R. 441.

[3] Macmanus *v.* Crickett, 1 East, R. 106.

[4] Wright *v.* Wilcox, 19 Wend. (N. Y.) R. 343. In Macmanus *v.* Crickett, *ub. sup.*, Lord Kenyon said: — "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." He puts the master's liability on the ground of negligence or unskilfulness, with no purpose but an execution of his orders. The Court, in Wright *v.* Wilcox, *ub. sup.*, say: — "The dividing line is the *wilfulness* of the act. If the servant makes a careless mistake of commission or omission, the law holds it to be the *master's business negligently done.* But it is different with a wilful act of mischief. To subject the master in such a case, it must be proved, that he actually assented, for the law will not imply assent. In the *particular affair*, there is, then, no longer the presumed relation of master and servant. The distinction seems to resolve itself into a question of evidence."

[5] Croft *v.* Alison, 4 B. & Ald. R. 590.

[6] Gregory *v.* Piper, 9 B. & Cress. R. 590. In an action of trespass, it is competent for the jury to consider the words which the defendant used subsequently to the trespass, in coming to the conclusion whether he was a joint trespasser with him actually committing the mischief. McLaughlin *v.* Pryor, 1 C. & Marsh. R. 354; and see Chandler *v.* Broughton, 1 Cr. & Mees. R. 29; and see *ante*, § 575.

§ 605. In Wright *v.* Wilcox, in New York,[1] there was an action on the case for an injury sustained by the son of the plaintiff, who was a minor, in being run over by a wagon driven by S. W., the son of J. W., whilst in the employment of his father. The plaintiff's son was a very young lad, and on his way to school, asked S. W. to permit him to ride; who answered that he might, when he got up a hill which he was then ascending. When the hill was ascended, the lad took hold of the side of the wagon between the front and the hind wheels. S. W. did not stop his team. He was cautioned by a by-stander, that if he did not stop, he would kill the boy. He looked behind him; the horses were then walking; and seeing the plaintiff's son and other boys attempting to get on the wagon, he cracked his whip and put his horses on a trot. The plaintiff's son soon fell, and one of the hind wheels passed over him, and greatly injured him. A joint action was brought against the defendants. The Judge charged the jury, that both of the defendants were liable, whether the injury was wilful, or only attributable to negligence. But a new trial was granted, on the ground, that it was difficult to infer from the evidence any thing short of a design in S. W., the driver, to throw the plaintiff's boy from the wagon. If S. W., the driver, said the Court, acted, in whipping the horses, with the wilful intention to throw the plaintiff's boy off, it was a plain trespass, for which his master was no more liable, than if his servant had committed any other assault and battery.

§ 606. The weight of authority may now be in favor of the doctrine, that if an injury done by one person to another is both *direct* and *consequential*, the party injured has an election to bring case or trespass.[2] As where the defendant so

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[1] Wright *v.* Wilcox, 19 Wend. (N. Y.) R. 343.

[2] *Ante*, § 602; Blin *v.* Campbell, 14 Johns. (N. Y.) R. 432. That the trespass may be waived, see Morton *v.* Harderne, *ante*, § 603. The general principle established in Spencer *v.* Percival, 18 Johns. R. 283, is, that

carelessly drove his horse and gig as to run against the plaintiff in the street, and knock her down; whereby she was injured and became permanently lame; it was held, that case was a proper action.[1]

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whether trespass or case is the proper action, depends on the fact, whether the injury was immediate or consequential. But, another principle is also recognized, viz., that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and to declare in trespass, as in Blin *v.* Campbell, *ub. sup.* See also Turner *v.* Hawkins, 1 Bos. & Pull. R. 472. In Hall *v.* Pickard, 3 Campb. R. 187, it was held, that if the owner of a horse lets him to hire for a time certain, during which he is killed by the owner of a cart driving it violently against him, the remedy of the owner of the horse is case and not trespass. But Lord Ellenborough, in this case, said: — "It may be worthy of consideration, whether, in those instances where trespass may be maintained, the party may not *waive the trespass*, and *proceed for the tort.*" Where A., through negligence and undesignedly, discharged a firelock in such a manner, as to wound B., it was held, that B. had his election to treat the negligence of A. as the cause of the injury, and declare in case; or to treat the act itself as the cause of the injury, and declare in trespass. Dalton *v.* Favour, 3 N. Hamp. R. 465. See also there cited, 5 Bos. & Pull. R. 117; 3 Burr. R. 1560; 14 Johns. R. 432; 3 East, R. 600, 601. *Contra*, Gates *v.* Miles, 3 Conn. R. 64. But this case might as well have been decided for the plaintiff; and it is very probable that the fact, that the action of trespass was barred by the statute of limitations, induced the Court to deny the remedy by an action on the case. Per Redfield, J., in Clafflin *v.* Wilcox, 18 Vermt. R. 605. In this case it was held, that an action on the case might be sustained for an injury to the plaintiff's horse which was injured by the great force by which it was struck by the improper and careless driving of the defendant's vehicle. The action on the case is altogether the most favorable for the defendant, because he can make a defence without the technicality of special pleading, and the plaintiff must recover a larger sum in trespass, in order to carry costs. There cannot be a doubt that a recovery in an action upon the case, may be pleaded in bar to an action of trespass afterwards brought for the same injury. *Curia*, per Savage, J., in M'Allister *v.* Hammond, 6 Cow. (N. Y.) R. 342.

[1] M'Allister *v.* Hammond, 6 Cow. (N. Y.) R. 342.

§ 607. If an injury be inflicted on a child while living with, and in the service of, his father, he may maintain trespass; but if at the time he be hired to, and in the service of, another, trespass on the case is the proper remedy.[1] But where a child is of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public highway, without any one to guard him, and is there run over by a traveller and injured, neither *trespass* nor *case* lies against the traveller, if there be no pretence that the injury was *voluntary*, or arose from culpable *negligence* on his part. Although the child, by reason of his tender years, is incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care *on the part of the parents or guardians* of the child, furnishes the same answer in respect to mutual negligence, as would the omission of ordinary care on the part of the plaintiff in an action by an adult. And, it seems, the same rule will apply in an action by a *blind*, or *deaf* man, who, under similar circumstances, received an injury on a public highway.[2] As an infant is personally liable for wrongs which he commits against the person or property of others,[3] so, when he complains of wrongs to himself, the respondent has a right to insist, that he should not have been the heedless instrument of his own injury.

§ 608. For an injury done to an infant, of the most tender age, by his being run over by a vehicle on the public highway, an action may be brought in the name of the child, by his next friend.[4] In respect to a very young child, the

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[1] Wilt *v.* Vickers, 8 Watts, (Penn.) R. 227. See also Flemington *v.* Smithers, 2 Carr. & Payne, R. 292.

[2] Hartfield *v.* Roper, 21 Wend. (N. Y.) R. 615.

[3] Bullock *v.* Babcock, 3 Wend. (N. Y.) R. 391, and the cases there cited.

[4] In England, it seems, the action *must* be so brought, but whether it be so in New York, under the Revised Statutes, *quære*. Hartfield *v.* Roper, *ub. sup.*

father (according to Hall *v.* Hollander[1]) can bring no action even for loss of service.

§ 609. (15.) *Rights of.*] Although a public carrier of passengers is under obligation to receive all persons, with their baggage, who apply for a passage, yet we have seen that this rule is subject to the carrier's right to provide for his own interests, by rejecting persons who apply whose character can be reasonably objected to, or who refuse to comply with the carrier's reasonable regulations for the proper arrangement and conduct of his business, or who have for their object an interference with the carrier's business, and entertain the design of making it less lucrative to him.[2] As the carrier is under obligation to receive and carry all persons who are not thus objectionable, when they have room, so, on the other hand, he is entitled to be secure of his *reward* and *compensation.* He has, therefore, a right to demand his fare at the time the passenger engages his seat; and if the passenger refuses, his place may be taken by another.[3] If a person takes a place in a conveyance, and pays at the time only a deposit, as half the fare, for example, and is not present and ready to take his place when the vehicle is setting off, the proprietor of the conveyance is at liberty to fill up his place with another passenger; but if at the time of taking his place he pays the whole fare, then the proprietor cannot dispose of the place, and the seat may be taken at any stage of the journey.[4] In order to guard against fraud, (as well as to secure the due payment of the fares,) as well on the part of the public as of their own servants, railway companies have invariably found it indispensable to adopt the *ticket* system, which requires fares in all instances

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[1] Hall *v.* Hollander, 4 B. & Cress. R. 660, and cited more fully, *ante*, § 598.

[2] See *ante*, § 524 – 531.

[3] 2 Steph. N. P. 984; Story on Bailm. § 603; *ante*, § 531.

[4] Ker *v.* Mountain, 1 Esp. R. 27.

to be prepaid; and tickets given to the passengers, which are considered as the sole vouchers for the payment of the fare, are collected from, or required to be exhibited by, the passengers before they leave the trains or stations.[1] The ticket obtained by a passenger (in connection with the established rules of a railroad company) was treated in the light of a *special contract* in the case of Cheney *v.* Boston and Maine Railroad Company.[2] By the rules of the company the purchasers of tickets for a passage on the road, from one place to another, were required to go through in the same train; and passengers who were to stop on the road, and afterwards finish their passage, in another train, were required to pay more than when they were to go through in the same train. A., not knowing these rules, purchased a ticket for a passage from D. to B., and entered the cars with an intention to stop at E., an intermediate place, and go to B. in the next train. When he took his ticket, he was informed of the rule that required him to go through in the same train, and a check was given him, on which were the words "good for this trip only." The conductor then offered to give back to A. the money which he had paid, deducting the amount of his passage from D. to E., which A. refused to accept, but demanded the ticket in exchange for the check. He stopped at E., went to B. on the same day, in the next train, and offered his check, which was refused, and he was obliged to pay the price charged for a passage from E. to B., and afterwards brought an action against the company for *breach of contract.* It was held that the action could not be maintained.

§ 609 *a.* If the passenger carrier undertakes to convey persons without having been previously paid, the law presumes that he considers the possession of their baggage or luggage a security for his expected remuneration; and,

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1 See *ante*, § 525, 530, *note.*

2 Cheney *v.* Boston and Maine Railroad Co. 11 Met. (Mass.) R. 121.

agreeably to this presumption, he may detain the possession at the end of the transit, until he has received satisfaction. The carrier, in other words, has a *lien* upon the baggage or luggage of passengers; but not on their persons, or the clothes they have on.[1] The general doctrine of lien, as applicable to the carriage of every description of property, has been largely discussed in a preceding chapter.[2] As to the carrier's right to the recovery of his fare after the possession of the baggage has been parted with, he is of course, in such event, compelled to have recourse to an action at law; for a person cannot have a lien upon any property, unless it is legally in his possession.[3]

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[1] Wolf *v.* Summers, 2 Camp. R. 631, and *ante*, § 375.

[2] *Ante*, Chap. IX. § 357 – 391. That if A. come wrongfully into possession of property which he delivers to a carrier or to an innkeeper, there is still a lien upon it, unless the carrier or the innkeeper knew that A. was a wrongdoer, see *ante*, § 364 – 368. Held in Grinnell *v.* Cooke, in New York, 3 Hill, R. 485, that if a traveller, having wrongfully taken a horse, put up at an inn, and became a guest, the innkeeper, *provided he had no notice of the wrong*, may assert his lien on the horse, even as against the true owner. Of course the same doctrine is applicable to the delivery of baggage by a passenger, in a public conveyance. See Mason *v.* Thompson, 9 Pick. (Mass.) R. 288.

[3] *Ante*, § 376, 391.

CHAPTER XII.

OF CARRIERS OF PASSENGERS BY WATER.

§ 610. The peculiar character, in a legal point of view, of common carriers of passengers by water, renders it expedient that the subject of their duties and liabilities should be considered in a separate and distinct chapter. They are of course bound, like common carriers of passengers by land, to the utmost care and diligence, on the part of themselves and their servants,[1] and for the sufficiency of their water-craft;[2] and their obligation in the latter respect, or, in other words, the duty of sea-worthiness, is analogous to the duty in respect to land-worthiness, of land carriers.[3] But in cases of personal injuries on the voyage, and in cases of injuries occasioned by collision of vessels, where the service is the transportation of goods or passengers within the limits of *tide waters*,[4] the Admiralty Court has jurisdic-

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[1] See *ante*, § 523, § 568, *et seq.*, § 540, *et seq.*

[2] See *ante*, § 539.

[3] See *ante*, § 534, *et seq.*

[4] See *ante*, § 419. That a Court of Admiralty has jurisdiction over *marine torts*, generally, see *ante*, § 420; and over *wrongs committed by the master of a ship on a passenger*, on the high seas, Chamberlain *v.* Chandler, 3 Mason, (Cir. Co.) R. 242. In that case, there was a libel in the Admiralty against the master of a ship for ill treatment of certain passengers. No exception was interposed against the jurisdiction of the Court, but Mr. J. Story, in giving the opinion of the Court, wished it to be understood, that the point had not passed *sub silentio*, and that it had attracted the consideration of the Court; and he proceeded to say: "The contract itself is a maritime contract for the conveyance of passengers on the *high seas*, and the wrongs complained of, are gross ill treatment and misconduct in the course of the voyage, while on the *high seas*, by the master, in breach of the stipulations necessarily implied in his contract, of

tion ;[1] and indeed that tribunal is the only one, under the dominion of the Common Law, which can administer a rem-

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the duties of his office, and of the rights of the libellants, under the maritime law. The jurisdiction of Courts of Admiralty over torts, committed *in personam* on the high seas, has never, to my knowledge, been doubted or denied by the Courts of Common Law, and has often been recognized by adjudications in the Admiralty, 2 Brown, Adm. 108; 3 Bl. Comm. 106. In 4 Inst. 134, the Common Law Judges admitted, in the fullest manner, that of contracts, pleas, and *querelas* made *upon the seas*, &c., the Admiral hath and ought to have jurisdiction." The learned Judge, in expounding the law in respect to Admiralty jurisdiction in such cases as those in question, further asserted, that it made no difference in point of principle, whether an injury to a passenger by the master be *direct* or *consequential* wrong, "whether it be an assault and imprisonment or a denial of all comforts and necessaries, whereby the health of the party is materially injured, or he is subjected to gross ignominy and mental suffering." The Admiralty has been accustomed to deal with subjects of this nature from very early times. In the case of the Ruckers, 4 Rob. R. 73, a civil suit for damages was brought in the Admiralty for an assault by the master of a ship on a passenger on the high seas, and, on full consideration, the jurisdiction was sustained. On that occasion, the Court directed the records to be searched, and the Registrar reported, "that many instances were found of proceedings *on damage* on behalf of persons described as part of the ship's company, against officers or others belonging to the same ship, and that there were other instances of proceedings on the part of A. B. against C. D. without any specification of the capacity in which the persons stood." Sir William Scott said, — "Looking to the *locality* of the injury, that it was done on the *high seas*, it seems to be fit matter for redress in this Court." See also the elaborate opinions of several of the Judges of the Supreme Court of the United States, upon the subject of Admiralty jurisdiction, in the case of the New Jersey Steam Navigation Company *v.* Merchants Bank, 6 How. (U. S.) R. 344. See 7 Peters, (U. S.) R. 324. Admiralty jurisdiction of the Courts of the United States is not taken away because the Courts of Common Law may have jurisdiction in a case within the Admiralty. Nor is a trial by jury any test of Admiralty jurisdiction. The subject-matter or service gives jurisdiction in Admiralty; and *locality* gives it in *tort* or *collision*. In such cases happening upon the high seas, or within the ebb and flowing of the tide, as far up a river as the tide ebbs and flows, though it may be *infra corpus comitatus*, Courts of Admiralty of the United States have jurisdiction. Waring *v.* Clarke, 5 How. (U. S.) R. 441.

[1] Abbott on Shipp. (5th Am. Ed.) 282, *et seq.*, 300, *et seq.*

edy *in rem*, (which commences with the arrest of the vessel,) and hold the vessel whose master and crew have been in fault, liable for the payment of damages. It is on this account, that important questions of collision more frequently occur in Courts of Admiralty than in Courts of Common Law, though they have occurred in both. The Admiralty jurisdiction also extends, in cases of collision, alike to foreign and domestic vessels, and whether both be foreign or both be domestic. In a case in the Court of Admiralty in England, between two foreign vessels, which had come into collision on the Kentish coast, an appearance was given under protest, denying the jurisdiction of that Court, by the owners of one of them. The Court held, that causes of collision were *communis juris*, and had no doubt of its jurisdiction to entertain the suit, and, if necessary, to compel security to be given for costs.[1]

§ 610 *a*. The commercial intercourse between different States in this country by means of *lake* navigation, having become extensive, and so important as to fall within the policy which dictated the extension of the Federal Judiciary to cases of Admiralty jurisdiction, the act of Congress of February 26, 1845, was passed, extending the jurisdiction of the District Courts to "certain cases upon the lakes and navigable waters connecting the same;" saving, however, to the parties, the right of trial by jury of all the facts put in issue in such suits, where either party shall require it; and saving, also, to the parties the right of a concurrent remedy at the Common Law where it is competent to give it; "and any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation." With respect to the nature and extent of the jurisdiction conferred by the act in question, the act itself declares, that "the *same* jurisdiction in all matters of *contract* and *tort*, as is now possessed

[1] Ibid. 314; The Johann Friederich, 1 W. Rob. R. 35.

by the said Courts, (Admiralty) in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide waters, within the Admiralty and Maritime jurisdiction of the United States; and in all suits brought in such Courts, in all such matters of tort and contract, the *remedies and forms of process, and the modes of proceeding*, shall be the same as are, or may be used, by such Courts in cases of Admiralty and Maritime jurisdiction; and the Maritime law of the United States, as far as the same may be applicable thereto, shall constitute the rule of decision in such suits." [1] The act appears to be limited in its terms to commerce and navigation, carried on between different States and Territories, and thus appears not to embrace cases arising out of the commercial intercourse between American ports and the neighboring British dominions; unless these dominions should be adjudged to have been intended by the term "territories."

§ 611. It is proposed to consider, first, the duties and liabilities of common carriers of passengers by water, in respect to the *treatment, accommodation, &c. of the passengers*, as those duties and liabilities have been the subjects of adjudication under the jurisdictions of the Common Law and of the Admiralty; and, secondly, the rules established under each jurisdiction, which furnish grounds of responsibility or excuses for damage, in case of accidents which have arisen from *improper navigation and collision of vessels.*

§ 612. *First.* — The frequent and increasing intercourse by water, between different portions of the extensive territory of the United States, and the present very great extent of the intercourse between the United States and distant foreign countries, has rendered that branch of the law which

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[1] Conklin on The Admiralty Jurisdiction, &c.; and see *post*, § 641, note.

relates to passenger-ships and vessels of the utmost importance. That it is the duty, as a general rule of law, of the owners and masters of vessels, who hold themselves out as carriers of passengers, to receive all persons who apply for a passage, provided they are unexceptionable in character, &c. and the fare be tendered, we have shown to be unquestionable.[1] In this respect there is no difference between carriers of passengers by water from one place to another in the same country, and carriers of passengers beyond the seas. In Bennett *v.* Peninsular Steamboat Company,[2] the question directly arose, whether a man could be a common carrier of passengers from a place that is within, to a place that is without, the realm; that is, whether or not the defendants were common carriers of passengers for hire from Southampton, in England, to Gibraltar, in Spain. It appeared on the trial before Wild, C. J., at the sittings, that the defendants were the proprietors of certain steam-vessels, one of which was advertised by circulars issued by the defendants to sail every ten days, from Southampton for Corunna, Vigo, Oporto, Lisbon, Cadiz, and Gibraltar, — the circulars giving the times of starting, and the terms upon which passengers were to be conveyed to those places respectively, and goods also, if there was room for them; that the plaintiff went to Southampton, for the purpose of taking his passage by the Montrose, the name of one of the defendants' vessels; but that, in consequence of some communication which had been made to the defendants by the Portuguese consul, their agent refused to allow him to take a passage, although it was admitted that there was plenty of room. It was submitted, on the part of the defendants, that the Common Law liability of carriers did not extend to carriers of *passengers*, or to extra-territorial carriers; and that the company's circulars imported a limited, and not a general, undertaking to carry passengers.

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[1] *Ante*, § 525, *et seq.*

[2] Benett *v.* Peninsular Steamboat Company, 6 Manr., Grang. & Scott, R. 775.

The learned Judge left it to the jury to decide whether or not there was evidence to induce them to believe that the defendants carried on the business of common carriers for hire; and the jury found in the affirmative. Upon leave being given to the defendants to move to enter the verdict for them, if the Court should be of opinion that this was not the fair legal inference from the evidence; it was held, that the question was properly left to the jury, and properly found by them; and that the declaration of the plaintiff, when it calls the defendants "common carriers of passengers," did not mean to allege that they were carriers within the realm, and according to the custom of the realm, but that *they were persons who were in the habit of conveying passengers for hire, from England to certain places beyond the seas.*[1] And every person taking passage is presumed to contract, in respect to accommodations, &c. during the voyage, (in the absence of a special agreement,) in reference to the usage of the particular voyage.[2] In all cases of commercial usage, the law presumes that the parties contracting did not mean to commit to writing the whole of their contract by which they intended to be bound, but that they contracted on the understanding that established usage should explain what is left doubtful.

§ 613. In an action against the captain of a ship for not furnishing good and fresh provisions to a passenger on a voyage, Lord Denman said, in his address to the jury: — "I think the result of the evidence is, that the captain did not supply so large a quantity of food and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he has, therefore, a right of action against the captain, who does not

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[1] See *ante*, § 87, 88.

[2] *Ante*, § 533; Abbott on Shipp. (5th Am. edit.) 284.

provide all that he ought; you must be satisfied that there was a real grievance sustained by the plaintiff."[1]

§ 614. In the case of an express contract between a passenger and the master, the rights of the parties will of course be governed by its terms; for any commercial usage, however well established, can be of no efficacy to defeat the plain meaning expressed by the parties. There have been several cases at Common Law of particular contracts in respect to a passage by sea, of the use of which we shall here avail ourselves, as they have been collected and set forth by Lord Tenterden, in his valuable treatise on the law relative to merchant-ships, &c.[2]

§ 615. In the case of Corbin *v.* Leader,[3] the defendant, the master of an East Indiaman about to sail from Calcutta, on a voyage to London, by an agreement under seal, granted and let to the plaintiff the whole of the cabins and accommodations fitted up for the reception, convenience, and conveyance of passengers on board the ship, and the defendant covenanted to promote, as far as in him lay, the comfort and convenience of the plaintiff and such persons as he should engage and contract with, and who should be received as passengers in and on board the said ship; in consideration whereof, the plaintiff covenanted with the defendant, among other things, to pay the defendant the sum therein agreed on; and that he would in every respect support and uphold the authority and command of the defendant, and in no way interfere with the management or navigation of the ship, or with the affairs thereof. The plaintiff further covenanted, that if in the progress of the voyage it should be necessary, for the convenience and at the request of the plaintiff, to touch or put into any other intermediate port or ports, save

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[1] Young *v.* Fewson, 8 C. & Payne, R. 56.

[2] Abbott on Shipp. *ub. sup.*, 284, *et seq.*

[3] Corbin *v.* Leader, 10 Bing. R. 275.

and except St. Helena, he would bear and pay all port and other necessary charges which might be incurred thereby. The Court held, that this stipulation as to the payment of the charges of touching at an intermediate port, thus interwoven with the covenant of the defendant, clearly showed that stopping in the course of the voyage was a thing contemplated by the parties, as conducive to the convenience of the passengers, and that the defendant was bound so to stop at the request of the plaintiff, unless it would have interfered with the safety of the vessel.

§ 616. In an action of assumpsit, by the master of an East Indiaman against a lieutenant in the Company's service, who had been his passenger on a voyage from Madras to London, it appeared that by an order of the Court of Directors, officers of that rank were to pay one thousand rupees, and no more, for "their passage, and accommodation at the captain's table," and this sum was paid into Court. For the plaintiff it was contended, that the defendant, for the regulation price, was only entitled to swing his cot in the steerage, and that he had been allowed a cabin to himself, for which the additional payment was required. Evidence having been giving, that during the voyage no officers slept in the steerage, and that the defendant's cabin would have remained empty had he not occupied it, Lord Ellenborough was of opinion that there was nothing to raise an implied promise to pay more than the regular sum.[1]

§ 617. The case of Gillan *v.* Simpkin, was an action for money had and received, to recover passage money paid to the defendant, as master of a ship, in which he had agreed to carry the plaintiff as a passenger to Antigua. The plaintiff, who had paid the money before the commencement of the voyage, had intended to have gone on board at Portsmouth, but the luggage was shipped in the river Thames,

[1] Adderley *v.* Cookson, 2 Campb. R. 15.

and in proceeding round from thence to Portsmouth, the ship was lost. It appeared in evidence, that it is usual for the passage money to be paid in London, and that the stores for the use of the passengers were always put on board in the river. Chief Justice Gibbs, in his direction to the jury, said, "If the money had been to be paid at the end of the voyage, the defendant could not have recovered any part of it, there being an entire contract to carry the plaintiff from London to Antigua. But if the voyage was commenced, and the ship was prevented from completing it by perils of navigation, the captain may be entitled to retain the passage money previously paid to him. The contract for this purpose may either be express or may be evidenced by established usage. Here it is proved, that in West India voyages the passage money is paid before the voyage commences, and it does not appear to be returned, although the voyage is defeated. On the other hand, if the ship were lost before the commencement of the voyage, for which these parties had contracted, the money paid by anticipation must be returned." [1]

§ 618. The master of a vessel sought to recover damages from the defendant for the breach of a verbal agreement, by which he engaged two cabins on a voyage from England to Madras for a certain price. He refused to go, because the vessel, which was to have left the docks by the 10th of October, did not. It was proved to be the rule of the East India trade, that when a passenger refused to go, in consequence of a delay in the sailing of a vessel, he was to forfeit half the amount of the passage money agreed for. The ship did not leave the docks until the 21st of October. "Chief Justice Tindal directed the jury to find for the plaintiff, with half the passage money as damages, if they thought that the time of sailing was matter of representation, but not an essential part of the contract, and that,

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[1] 4 Campb. 241; and see Leeman *v.* Gordon, 8 Car. & P. 392.

under the circumstances, the ship had sailed within a reasonable time." [1]

§ 619. In an earlier case, in which the plaintiff sought to recover passage money on an implied assumpsit *pro ratâ itineris peracti*, it appeared that he had contracted to carry the defendant, his family and luggage, from Demerara to Flushing, and that in the course of the voyage, and within four days' sail of Flushing, the ship was captured by an English ship of war, and brought to England. The ship and cargo were libelled in the Court of Admiralty, and proceedings were pending against the ship, but the defendant and his family were liberated, and his luggage restored to his possession. The Court was of opinion, that if the ship had been restored, the action might have been maintained, but that as the result of the proceedings in the Court of Admiralty might be the condemnation of the ship, and decree of her freight to the captors, it was premature while that suit was pending.[2]

§ 620. The executors of an East India captain, who had died in the East Indies, before the commencement of the homeward voyage, brought an action against the chief mate of his ship, on whom the command had devolved, to recover the amount of the sum he had received from the passengers brought home in the ship, for their passage and entertainment during the voyage. It was contended, for the plaintiff, that the passage money must belong to the representatives of the captain; for the defendant, that he was entitled to the whole, because he had the actual command during the voyage. "If," said Mr. Justice Bayley, "there be no usage on the subject, I think the law is, that where the captain

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1 Yates *v.* Duff, 5 Car. & P. 569.

2 Mulloy *v.* Backer, 5 East, R. 316; and cited more fully *ante*, § 392, n. See also, as to the right of a passenger to be carried to the end of the voyage, *ante*, § 532.

has contracted to carry passengers, and dies, his representatives are entitled to the benefit of the contract, and may maintain an action for the passage money. If the mate lays out money in purchasing stores for such passengers, he is the agent of the representatives for that purpose, and may oblige them to repay him. But where, after the death of the captain, the mate contracts to carry passengers on the homeward voyage, he is himself entitled to the benefit of the contract, and may retain the whole of the passage money. If for the entertainment of such passengers he has any part of the stores laid in by the captain, for so much he must account to the captain's representatives." [1]

§ 621. The master or captain of a ship is regarded as an officer, to whom great power, momentous interests, and enlarged discretion are, from necessity, confided; and the situations of unforeseen emergency, in which he may be compelled to exert himself for the preservation of the life and property with which he is intrusted on the voyage, render it necessary that he should be invested with large, and, for the time at least, unfettered authority. Obedience to this authority, in all matters *within its scope*, is a duty which is expected to be discharged by every passenger. On the other hand, it is his duty to attend to the preservation of the health and comfort of the crew and passengers, as well as for the safety of the vessel and cargo.[2] In respect of passengers, the case of the master is one of peculiar responsibility and delicacy, and their contract with him is a stipulation, not for toleration merely, but for respectful treatment, and for that decency of demeanor, which constitutes the enjoyment of social life; " for that attention, which mitigates evils without reluctance, and that promptitude, which admin-

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[1] Siordet *v.* Brodie, 3 Campb. R. 253.

[2] 3 Kent, Comm. 158; Abbott on Shipp. (5th Am. edit.) 152, note, 218, 282.

isters aid to distress." [1] The stipulation in respect to females, says Mr. J. Story, in the case just referred to, proceeds yet farther; "it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of feeling, which aggravates every evil, and endeavors by the excitements of terror, and cool malignancy of conduct, to inflict torture upon susceptible minds." [2] In Chamberlain *v.* Chan-

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[1] Per Story, J. in Chamberlain *v.* Chandler, 3 Mason, (Cir. Co.) R. 242. In a case in the Circuit Court of the United States for the District of Massachusetts, the vessel had sailed from Cork with a large number of passengers ostensibly destined for Quebec; but on approaching the American coast, the passengers insisted upon being landed at New York or Philadelphia, alleging that they had contracted with the charterer, to be carried at one of those ports. The master refusing to comply with their request, they rose upon him, drove him down into the cabin with violence and threats, and, having compelled the mate to take an oath that he would carry the vessel into one of the above-mentioned American ports, or into Boston, put him in command. One of the crew of a fishing vessel was afterwards engaged to pilot the schooner into Boston; and having performed this service, he instituted a suit in the Admiralty, against the schooner to recover compensation. His demand was resisted on the ground that he came on board the vessel at the request of the mate and passengers, who, it was insisted, had no authority to bind her, and that he must, therefore, look to them for remuneration; and so the Court decided. The Ann, 1 Mason, (Cir. Co.) R. 508.

[2] It was intimated, said the learned Judge, that such acts, though wrong in *morals*, are yet acts which the *law* does not punish; that if the person is untouched and the acts do not amount to an assault and battery, they are not to be redressed. His opinion was, that the law involved no such absurdity; "and the law," said he, "gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by direct, or of consequential, injuries. In each case, said he, the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. He did not say, that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of the conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law, if it could not award some recompense."

dler, in the Admiralty,[1] the libellants were husband, wife, and children, who were passengers on board ship, on a voyage from Woakoo to Boston. The libel was against the defendant as master of the ship, for damage for alleged ill treatment and injuries to them during the voyage. The evidence is not given in the case, but, upon a full examination of it by Mr. J. Story, he came to the conclusion that the libel was sufficiently proved to entitle the libellants to damages.[2]

§ 622. The treatment of the passenger, due from the master, depends in a great degree upon the passenger's conduct and behavior during the voyage.[3] Conduct in a passenger in a ship on the ocean, which is unbecoming a *gentleman*, in the strict sense of the word, will, it seems, justify the captain in excluding such passenger from the cuddy table, whom he has engaged by contract to provide for there; though it is difficult to define what degree of indecorum would, in point of law, warrant such exclusion. It is however clear, that if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. If the husband be excluded, and the wife, not from compulsion, but from a wish to be with her husband, take her meals with him in private, this will not amount to a breach of contract on the part of the captain, so far as regards the wife. In Pendergast *v.* Compton,[4] the action was brought by the plaintiff, a captain in the army, against the defendant, the captain of the ship Bolton, to recover damages for the breach of a contract, by which he undertook to convey the plaintiff and his wife, as cuddy passen-

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[1] *Ub. sup.*

[2] And he accordingly decreed, that the defendant should pay $400 damages (being the amount of his share of the passage money received for the passage of the libellants) and costs of suit.

[3] *Ante*, § 532, 533.

[4] Pendergast *v.* Compton, 8 C. & Payne, 454.

gers, on a voyage from Madras to England. The plaintiff's complaint consisted of three particulars: first, that the defendant did not treat him and his wife as cuddy passengers; secondly, that he did not provide good and sufficient meat, drink, &c.; and, thirdly, that he excluded him from the cuddy, and from walking on the weather side of the ship. Tindal, C. J., in summing up, said, — "With respect to the second ground of complaint, there is scarcely enough to justify any charge; and as, on the side of the plaintiff, some things have been thought of that would never have been thought of if no other ground of complaint had existed; so, on the other side, many things have been introduced which, under other circumstances, never would have been referred to. Therefore, I think, you may consider the question upon the first and third grounds, which seem very much to stand upon the same footing, the unfitness of the plaintiff to associate with the other passengers. The question for you is, whether the defendant has shown that he had a good cause of justification for the exclusion of the plaintiff from the cuddy, and from certain parts of the deck. The plaintiff complains, that his wife also was excluded from the cuddy, but in fact she was not excluded, except so far as a proper feeling, on her part, would lead her to remain with her husband. The defendant rests his defence on three distinct grounds, all of which he says operated on his mind at the time. First, he says that the conduct of the plaintiff was vulgar, offensive, indecorous, and unbecoming. There is some evidence that he was in the habit of reaching across other passengers, and of taking broiled bones with his fingers. It would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle. The second ground on which the defendant relies is, the incident which took place on the 19th of July. The conversation on that occasion seems substan-

tially to be proved by the different witnesses, as it is stated in the plea, and one cannot help thinking, from all the circumstances of the case, that this was the motive operating on the defendant's mind. The third ground is, the threat used by the plaintiff, that he would cane the defendant. But it does not seem to me that the threat was heard by the defendant before he gave the order for the exclusion of the plaintiff from the cuddy. I do not see, upon the evidence, that it was, but it is for you to say. It is important to consider this, as, if it did operate on the mind of the defendant at the time of the exclusion, I cannot conceive that such conduct would not justify that exclusion. A man who had threatened the commanding officer of the ship with personal violence, would not be a fit person to remain at the table at which he presided. If the whole of the defendant's justification is made out, you will find your verdict for him. If it is not made out, you will find your verdict for the plaintiff, and give him such damages as you think he is entitled to receive."[1]

§ 623. Whatever is necessary for the security of the vessel, the discipline of the crew, the safety of all on board, the master may lawfully require, not only of the ship's company, who have expressly obligated themselves to obey him, but of those also whom he has engaged to carry to their destination, on the implied condition of their submission to his rule. But the exercise of power thus undefined must, at the master's peril, be restricted to the necessity of the case; and on the ground of such necessity, and within its limits, he may enforce and justify orders, which would otherwise expose him to censure, to civil responsibility, and to punishment.[2] A passenger who is found on board in time of danger, is bound, at the master's call, to do works of necessity in defence of the ship, if attacked, and for the preservation

[1] Verdict for the plaintiff — Damages 25*l.*

[2] 3 Kent, Comm. 183; Abbott on Shipp. (5th Am. ed.) 282.

of the lives of all on board.[1] Yet, as he may lawfully, except under peculiar circumstances, leave the ship, should he voluntarily remain, at the risk of his personal safety, to assist in distress, he may be entitled to remuneration for his service.

§ 624. In an action of assault and false imprisonment on board an East Indiaman, in a voyage from Bombay to Calcutta, it appeared that the plaintiff was a passenger in the gunner's mess, and that the defendant was captain of the ship. Near the Cape of Good Hope, two strange sail were descried in the offing, supposed to be enemies. The defendant immediately mustered all hands on deck, and assigned to every one his station. The plaintiff, with the other passengers, he ordered on the poop, where they were to fight with small arms. This order all readily obeyed, except the plaintiff, who, conceiving he had been ill used by the defendant some time before, in being forbidden to walk on the poop, positively refused to go there, but offered to fight in any other part of the ship with his messmates. The defendant, for this contumacy, ordered him to be carried upon the poop, and there kept him in irons during the whole night. Next morning no enemy appeared, and the ship arrived safe at St. Helena, where the plaintiff quitted her. Lord Ellenborough, at first, said that he did not know that the confinement of the plaintiff was not necessary, and therefore justifiable; but when it came out that he had been kept all night in irons on the poop, he clearly held that the defendant had exceeded the limits of his authority.[2]

§ 625. The master of a vessel who undertakes to convey passengers for a reward, is of course bound to carry them safely, to the end of the voyage, and to this end it is incum-

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[1] Newman *v.* Walters, 3 Bos. & Pull. R. 612.

[2] Boyce *v.* Bayliffe, 1 Campb. R. 58.

bent upon him, as we have seen, to exercise the utmost care ;[1] but no evidence can be given of a specific act of negligence which is not the foundation of a suit. In an action for negligently steering a ship, whereby she was wrecked, and the plaintiff lost his passage in her, the first count in the declaration stated, that the defendants were the owners of the ship A., and that the plaintiff took his passage in that ship from Madras to London, and paid his passage money; and that it became the defendant's duty to convey him safely; yet that, by reason of the negligence of the defendants and their servants, the ship was wrecked; and that the plaintiff was injured by having to pay a passage in another ship, and was delayed for the same. An officer in the navy, who was a passenger in the A., was called to prove the negligence of the captain and crew. He was proceeding to state their negligent conduct at an earlier part of the day, on which the accident happened, but Abbott, C. J., held, no evidence could be given of a specific negligence which was not the ground of the plaintiff's action. The witness was then asked who had the charge of the watch at the time the ship was wrecked, and he stated that it was the second mate; and that he had, both before and after the wreck, heard the captain say, that the second mate was wholly incompetent to have the charge of the watch.[2] Objections being made to these statements of the captain being received in evidence, the learned Judge said he must receive the evidence; the captain, he said, "leaves the ship in the charge of a person he himself considers incompetent: this is certainly evidence of negligence on his part." Evidence was given that, for some hours before the wreck, the ship was within a bay, and no soundings were made, nor lookout kept; which evidence was confirmed by many witnesses. Evidence was also given of the expense and loss incurred by the plaintiff in

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[1] *Ante*, § 523, 568. See *ante*, § 532.

[2] See *ante*, § 540, 541, 542.

consequence of the wreck. A witness was then called, who stated he had been a master in the navy for seventeen years, and the plaintiff's counsel wished to ask him, as a man of experience in nautical matters, whether, supposing the facts as proved to have occurred, they showed negligence in the captain. This was objected to; but the learned Judge held, that the plaintiff's counsel might state to the witness what had been done, and might ask him if a man of competent skill would have done so. The defence was, that there was no negligence; and to prove this, the captain, chief mate, and some of the crew (having been released,) [1] were called. The question of negligence, or no negligence, was left to the jury, and they gave a verdict for the plaintiff.[2]

§ 626. In England, Parliament has by various statutes, applicable to different voyages, interposed to protect unwary emigrants from the fraud and cupidity of unprincipled ship-owners.[3] Besides security for the seaworthiness of the ship, those statutes provide for a due proportion between her tonnage and the number of her passengers. In the United States, by an act of Congress of 2d March, 1819, ch. 176, it is provided, "§ 1. That if the master, or other person on board of any ship or vessel, owned in the whole or in part by a citizen or citizens of the United States, or the territories thereof, or by a subject or subjects, citizen or citizens, of any foreign country, shall, after the first day of January next, take on board of such ship or vessel, at any foreign port or place, or shall bring or convey into the United States, or the territories thereof, from any foreign port or place; or shall carry, convey, or transport, from the United States, or the territories thereof, to any foreign port or place, a greater

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[1] See *ante*, § 469.

[2] Malton *v.* Nesbit, 1 C. & Payne, R. 70.

[3] Abbott on Shipp. (5th Am. ed.) 283, 289, *et seq.*; and see The Two Friends, 1 Rob. (Adm) R. 285; The Beaver, 3 Ibid. 292; The Joseph, 1 Ibid. 306, cited in Abbott, *supra*.

number of passengers than two for every five tons of such ship or vessel, according to custom-house measurement; every such master, or other person so offending, and the owner or owners of such ship or vessel, shall severally forfeit and pay to the United States the sum of one hundred and fifty dollars, for each and every passenger so taken on board of such ship or vessel, over and above the aforesaid number of two to every five tons of such ship or vessel; to be recovered by suit in any Circuit or District Court of the United States, where the said vessel may arrive, or where the owner or owners aforesaid may reside; *provided*, *nevertheless*, that nothing in this act shall be taken to apply to the complement of men usually and ordinarily employed in navigating such ship or vessel. § 2. That if the number of passengers so taken on board of any ship or vessel as aforesaid, or conveyed or brought into the United States, or transported therefrom as aforesaid, shall exceed the said proportion of two to every five tons of such ship or vessel, by the number of twenty passengers, in the whole, every such ship or vessel shall be deemed and taken to be forfeited to the United States, and shall be prosecuted and distributed in the same manner in which the forfeitures and penalties are recovered and distributed under the provisions of the act, entitled, 'An Act to regulate the collection of duties on imports and tonnage.'"

§ 627. To subject a vessel to forfeiture according to the provisions of the above act, there must be an excess of twenty passengers, beyond the proportion of two to every five tons of the vessel; and in estimating the number of passengers under the act, no deduction is to be made for children, or persons not paying; but those employed in navigating the vessel are not to be included.[1] In reply to the argument, urged in the case just referred to, that children, especially those of a very tender age, and all non-

[1] United States *v.* The Louisa Barbara, Gilp. R. 332.

paying passengers, are not within the object of the law, and the evil to be prevented by it, and therefore could not be taken to be a part of the number of passengers to be allowed by the law, Judge Hopkinson said: "If we were to make these deductions of children and unpaid persons on board of a vessel from the number of her passengers, we should find no warrant for it, in the law, and throw the construction of the act into such uncertainty, as would render it little better than a nugatory attempt at legislation. In regard to children, we should be obliged to fix the age at which they might not be considered as passengers within the act, and the question of payment would often be as difficult to settle. The inconvenience to health and life from crowded vessels, are the same, whether the persons on board pay or do not pay their passages; and although it may not be probable that the owners of vessels will bring passengers for nothing, yet the law may be evaded and defeated by secret artifices and agreements on the subject of compensation for the passage, if it is to be understood that paying passengers only are within the law. The payment would thus become a part of the case of the prosecution; and legal proof would be required of it." In estimating the tonnage of a vessel, bringing passengers from a foreign country, the measurement of the custom-house, in the port of the United States at which the vessel arrives, is to be taken.[1]

§ 628. The above-mentioned act of Congress also provides, that every vessel bound on a voyage from the United States to any port on the continent of Europe, at the time of leaving the last port whence such vessel shall sail, shall have on board, well secured under deck, at least sixty gallons

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[1] Ibid. In England, a list of passengers is to be delivered before clearing to the collector, or other chief officer of the customs, at such port or place as may clear the ship, and a list also of additional passengers, after clearing out. Abbott on Shipp. 292. A similar provision exists in the act of Congress, of 2d March, 1819, ch. 170, § 4.

of water, one hundred pounds of salted provisions, one gallon of vinegar, and one hundred pounds of wholesome ship bread, for each and every passenger on board of such vessel, over and above such other provisions, stores, and live stock, as may be put on board by such master or passenger for their use, or that of the crew; and in like proportion for a shorter or longer voyage. And if the passengers, on board of such vessel in which the proportion of the provisions directed, shall not have been provided, shall at any time be put on short allowance, in any of the articles enumerated, the master and owner of such vessel shall severally pay to each and every passenger, who shall have been put on short allowance, the sum of three dollars for each and every day they may have been on such short allowance. The penalty to be recovered in the same manner, as seamen's wages are, or may be recovered.

§ 628 *a*. A later act of Congress, of 1847, limits the number of passengers to be taken on board vessels owned by citizens of the United States, or by those of any foreign country, at any foreign port, in proportion to the space occupied by them and appropriated for their use, and unoccupied by stores or other goods, where the intent is to bring such passengers to the United States; and the act extends also, to the taking of passengers on board within the jurisdiction of the United States; and likewise provides for the arrangement, construction, and dimensions of the berths.[1] A still later act, of 1848, was passed for the *proper ventilation* of passenger vessels, prescribing also the quantity of provisions and water, and in amendment of the first section of the act last before mentioned.[2] And again, in 1849, was an act

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[1] Acts of 2nd session of the 29th Congress, (chap. 16,) p. 19, and see the Act in the Appx. p. lxxvi.

[2] Acts of the 1st session of the 30th Congress, (chap. 41,) p. 24. This act provides also for other important objects. See the Act in the Appx. p. lxxvii.

passed extending the provisions of laws then in force relating to the carriage of passengers.[1]

§ 629. The safety of passengers on board of *steam-vessels* has also been the subject of legislation by Congress; and it has been a duty imposed by Congress upon the District Judge, within whose district there are ports of entry or delivery, upon the application of the master or owner of any vessel propelled by steam, to appoint one or more competent persons to make inspection of such vessels, and of the boilers and machinery; and the inspectors are to give certificates of their inspection, as enjoined by the act. The most important provision of the laws referred to, and one well intended to secure the end in view, is that the captain, engineer, pilot, and all other persons employed on board steam-vessels, by whose misconduct or inattention the life of any person on board may be destroyed, shall be deemed guilty of *manslaughter*. But for this, and many other provisions of importance to the public, and to the owners, masters, and engineers of steam-vessels, which are intended to secure the safety of all persons taking passage in steam-vessels, the reader is referred to the two acts of Congress on the subject, which have been referred to, and which are contained in our Appendix.[2] The safety of passengers by steam-vessels has also received the attention of the legislature of the State of New York, who have passed an act requiring steamboats or vessels driven by steam navigating the waters of that State to carry *small boats* for the protection of life in case of accident; and every violation of the provisions of the act is made punishable by fine not less than two hundred and fifty dollars, recoverable against the captain of the boat or vessel, or the owner or owners of either of them.[3]

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[1] Acts of the 2nd session of the 30th Congress, (chap. 3,) p. 107, and see the Act in the Appx. p. lxxxii.

[2] Appx. p. lxxxiv.

[3] Act to take effect from June 1, 1849, contained in Hunt's Merchants' Mag. for June, 1849, p. 656.

§ 630. In the construction of a State law in New York,[1] it has been held, that, in passing the Erie and Champlain canals, freight boats are bound to afford every facility for the passage of packet boats, as well through the locks, as elsewhere on the canal. And where a freight boat passing on the Erie canal was waiting for the emptying of a lock, when a packet boat overtook her, it was held, that the packet boat should pass first. On request, the master of the freight boat, refusing to consent to this, the master of the packet may use all necessary means to obtain the preference due to him, short of a breach of the peace; as, by pulling back the freight boat, and forcing his own forward, doing no unnecessary damage to the freight boat. Should the freight boat be detained or injured, through the obstinate resistance of the master to the exercise of the right of preference of the packet; this is the fault of the former, for which he cannot recover damages against the master of the latter.[2]

§ 631. On many occasions the important question, whether certain *State* laws conflicted with the power of Congress to regulate commerce, has been agitated and decided; and among the instances of that kind which have occurred, there are two which relate to passengers brought to our shores in vessels from abroad. By one of the provisions of a law passed by the legislature of the State of New York,[3] the master of every vessel arriving in New York from any foreign port, or from a port of any of the States of the United States, other than New York, is required, under certain penalties prescribed in the law, within twenty-four hours

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[1] Of April 30, 1820, sess. 43, ch. 202, s. 4 and 10.

[2] Farnsworth *v.* Groot, 6 Cow. (N. Y.) R. 698. For the construction of the by-laws of a village, regulating wharves and basins on the Erie Canal, see Larned *v.* The Trustees of the Village of Syracuse, 5 Wend. (N. Y.) R. 166.

[3] In February, 1824, entitled "An Act concerning passengers in vessels arriving in the port of New York."

after his arrival, to make a report in writing, containing the names, ages, and last legal settlement of every person who shall have been on board the vessel commanded by him during the voyage; and if any of the passengers shall have gone on board any other vessel, or shall, during the voyage, have been landed at any place with a view to proceed to New York, the same shall be stated in the report. The Corporation of the city of New York instituted a suit (an action of debt) under that law against the master of a ship, for the recovery of certain penalties, imposed by the act, on the ground that he did not report as required. The Circuit Court were divided in opinion on the following point, which was certified to the Supreme Court of the United States: "That the act of the legislature of New York assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void." The supreme Court directed it to be certified to the Circuit Court of New York, that so much of the section of the act of the legislature of New York as applied to the breaches set forth, did not assume to regulate commerce between the port of New York and foreign ports; and that so much of the act in question was constitutional. The opinion of the Court was delivered by Mr. Justice Barbour, who considered the act of the legislature of New York, not a regulation of commerce, but of *internal police;* and hence it was passed in the exercise of a power which rightfully and constitutionally belonged to the State. The intention of the law was viewed as intending to prevent the State being burdened with an influx of foreigners, and to prevent their becoming paupers, and who, as such, would become chargeable. It was not only the right, but the bounden duty of a State, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by an Act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, are not surrendered or restrained by the constitution of the United States. From this opinion, however, Mr. Justice Story dissented, and

in support of his argument to the contrary, he relied on the opinion of Mr. Chief Justice Marshall, in Gibbons *v.* Ogden,[1] within the principles established by which case, he contended, the case before the Court directly fell.[2]

§ 632. Again, at the late term of the Supreme Court of the United States,[3] Mr. Justice McLean gave the opinion of the majority of the Court in Smith *v.* Turner, in error from the Supreme Court of New York, *against* the constitutionality of the statute of that State *imposing a tax* upon alien passengers, on the ground that it was a law regulating commerce. The case was distinguished from the above case of the City of New York *v.* Miln, inasmuch as the latter was determined upon the ground that the law there in question operated *within* the State of New York, and that it imposed no obstruction to commerce, nor caused any delay. A similar statute of the State of Massachusetts was at the same time held to be unconstitutional and void.[4]

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[1] Gibbons *v.* Ogden, 9 Wheat. (U. S.) R. 1.

[2] City of New York *v.* Miln, 11 Peters, (U. S.) R. 102. There was no collision, it was held by the Court, between the section of the Act of New York, on which this suit was brought, and the provisions of the laws of the United States of 1799, or 1819, relating to passengers.

[3] At the December Term, 1848.

[4] At this time a report of the decision has not been published by the Reporter of the Court; but in a report contained in the Boston Atlas of Feb. 12, 1849, (which the Editor says, is from a legal gentleman, and may be relied on,) there is the following abstract of the opinion of Mr. Justice McLean: — 1. Is the power of Congress to regulate commerce an exclusive power? 2. Is the Statute of New York a regulation of commerce? First: It is admitted that the States have not parted with any power, except by express grant in the Constitution, or by necessary implication. All powers which concern our foreign relations belong to the Federal Government exclusively. A review of the opinions of Judges in all the cases in which the question has arisen, leads to this result. C. J. Marshall, Judges Baldwin, Johnson, and Story, in various cases, are cited to show this. There cannot be a concurrent power in two sovereignties to regulate the same subject. It would involve an absurdity, and produce inevitable collisions. The power then, over commerce, is exclusively

§ 633. *Secondly*, as to *collision*, and of the Common and Maritime Law respecting it. The misfortune of a collision

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vested in Congress. Next: Is the law of New York a regulation of commerce? The States may guard against the introduction of any thing which may affect the health or morals of their citizens; but they are limited to what may be absolutely necessary for that purpose. Commerce includes navigation and intercourse as well as the exchange of commodities, and therefore includes the transportation of passengers. To encourage foreign emigration was part of the early policy of our government; and a large amount of tonnage has always been engaged in the carrying of passengers. Pilot laws are regulations of commerce, and the State laws have become the laws of Congress by adoption. The act of Congress expressly adopts them. They are not laws by force of any State power. A State may do many things which affect commerce, though it may not regulate it. It may tax a ship belonging to a citizen; but it is then taxed as part of the general property of the State. The act of New York is called a health law. The funds collected are called Hospital money. But it is difficult to see how it can be a health law. Part of the funds go to support institutions for juvenile offenders, and it might as well be applied to all the general purposes of the State. It might be increased so as to pay all expenses. The decision in the case of New York *v.* Miln, is entirely consistent with these views. That case was decided upon the ground that the law only operated *within* the State of New York. It imposed no obstruction to commerce, nor caused any delay. The transportation of passengers is regulated by acts of Congress; and being a branch of commerce, the act of New York is a regulation of it, and therefore void. After passengers have left the ship and mingle with the citizens of the States, then they may be taxed. A tax like this destroys the uniformity which ought to exist throughout the Union. The municipal power of the States cannot prohibit the introduction of passengers, except to protect itself against disease. This Court had decided, in the case of Groves and Slaughter, arising in Mississippi, that the Slave States had the power of prohibiting the introduction of slaves as *merchandise;* but Judge McLean omitted to make any allusion to the introduction of free persons of color into their ports. Congress has passed acts in aid of the State regulations of quarantine, and thus they have become regulations by Congress itself. If New York may thus tax passengers, citizens of the United States as well as foreigners, then every other State may do the same on every railroad and river throughout the Union. Perhaps nine tenths of the passengers landed at New York pass through to other places. The police power cannot pass beyond its proper limits. In guarding the health of its citizens, it cannot authorize a tax which regulates commerce. For these reasons

of one vessel with another may be the result of inevitable accident, or of circumstances beyond the control of the master, however mindful he may be of his responsibility, as by the violence of the wind and sea. It may be accidental, therefore, without fault on either side, or it may proceed from the negligence or unskilfulness of one or both the captains whose vessels come into collision.[1] Where an injury occasioned by a collision happens to one or both vessels, and is in consequence of mutual default, the apportionment of damages is different in the Admiralty from what it is at Common Law. Neither party, we have seen, can sue at Common Law, where damage is occasioned partly by the default of one party, and partly by that of the other; and if, in the opinion of the jury, the default of one party in any way concurred in causing the damage in question, he is not entitled to recover.[2] The rule of justice adopted by the Admiralty in such cases, is, that the loss shall be apportioned between the parties according to circumstances.

§ 634. A Court of Common Law, whether for its inability to adapt its judgment to cases of damage occasioned by collision of vessels from mutual negligence, or for any other cause, refuses to interfere at all.[3] In Kent *v.* Elstob, in the King's Bench,[4] a rule has obtained for setting aside an award

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Judge McLean declared the act of New York void; and for the same reasons the act of Massachusetts is also declared void. Chief Justice Taney, and Justices Daniel, Woodbury, and Nelson, concurred in sustaining the laws of the States. Mr. Webster in the Senate, and Mr. Ashmun in the House, moved in the matter, and offered resolutions of inquiry into the legislation which may be necessary in consequence of this decision.

[1] See Abbott on Shipp. (5th Am. Ed.) 300, *et seq.* For the law in relation to the collision of vessels of common carriers of goods and merchandise by sea, see *ante*, § 166, and 226, and Plaisted *v.* Boston and Kennebec Steam Navigation Co. 14 Shep. (Me.) R. 132.

[2] *Ante*, § 556, *et seq.*

[3] Per Gibson, J., in Simpson *v.* Hand, 6 Whart. (Penn.) R. 311.

[4] Kent *v.* Elstob, 3 East, R. 18.

of an arbitration, in a case for negligently running down the plaintiff's ship by another ship belonging to the defendants, on the ground of a mistake of the arbitrator in point of law. The alleged mistake was in awarding any damage to the plaintiff, when it appeared by his own showing, that either no negligence was imputable to the defendants, which was the gist of the action, or that at least the accident happened as much from the fault of one as the other. For these reasons it was held, the award could not be supported, Grose, J., saying, that "it is evident that he (the arbitrator) meant to determine according to law, and he was mistaken in it; therefore, the award is not such as he intended it to be."

§ 635. Lord Tenterden, in two cases at Nisi Prius, has laid down the doctrine of the Common Law applicable to cases of damage by a collision of vessels, where the damage has been in consequence of mutual negligence. In Vanderplank *v.* Miller,[1] which was a "running down" case, that learned Judge, in summing up to the jury, said: "If there was want of care on both sides, the plaintiffs cannot maintain their action; to enable them to do so, the accident must be attributable entirely to the fault of the crew of the defendants." On another occasion, at Nisi Prius, in an action for the negligence of the defendant's servant in managing his barge, whereby the plaintiff's barge was run down and sunk, Lord Tenterden said: "The plaintiff, in this case, complains of an injury to his barge through the negligence of the defendant's servants. If the accident happened from the state of the tide, or from any other circumstance which persons of competent skill could not guard against, the plaintiff is not entitled to recover; and so if the plaintiff's men had put this barge in such a place, that persons using ordinary care would run against it, the defendant will not be liable. Nor will he be liable if the accident could have been avoided, but for the

[1] Vanderplank *v.* Miller, 1 Moo. & Malk. R. 21.

negligence of the plaintiff's men, in not being on board his barge at the time when it was lying in a dangerous place. The only case in which the defendant is answerable, is, if the accident arose from the negligence or want of skill in his own men."[1] In an action in the Exchequer, for running down a vessel, Bayley, B., said: "The rule is, that the plaintiff could not recover if his ship were in any degree in fault, in not endeavoring to prevent the collision. Here the plaintiff had a right to presume, that the defendant's ship would do that which she ought to do. I quite agree, that if the mischief be the result of the combined negligence of the two, they must both remain in *statu quo*, and neither party can recover against the other."[2]

§ 636. In this country the above doctrine has been recognized by the Courts in a number of instances, as applicable in navigation to vessels, as well as to carriages on land.[3] In Simpson *v.* Hand, in Pennsylvania,[4] it was held to be an undoubted rule, that for a loss arising from mutual negligence, neither party can recover in a Court of Common Law; and this rule governed the shippers of goods on board vessels which come into collision, to the injury of the goods, as well as the owners of the vessels. Therefore it was held, that an action could not be maintained by the owner of goods on board a vessel against the owners of another vessel, to recover damages for an injury done to the goods by a collision of the two vessels, if there has been mutual negligence

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[1] Lack *v.* Seward, 4 C. & Payne, R. 106.

[2] Vennall *v.* Garner, 1 Crompt. & Mees. R. 21.

[3] See *ante*, § 557, *et seq*; and see note to Smith *v.* Smith, 2 Pick. (Mass.) R. 624, (Ed. 1848.) In the case of Palmer *v.* Barker, 2 Fairf. (Me.) R. 338, the opinion states, that when two persons are travelling in opposite directions, and are about to meet and pass each other, in so doing both are bound to use ordinary care and caution. And see Hartfield *v.* Roper, 21 Wend. (N. Y.) R. 615.

[4] Simpson *v.* Hand, 6 Whart. (Penn.) R. 311.

in the conduct of those who had the vessel in charge.[1] In Kennard *v.* Burton, in Maine,[2] the Court, after a careful examination of the adjudged cases respecting collisions, held the correct rule to be as above laid down.

§ 637. The doctrine of the Common Law, that neither party can recover for damage which has resulted from mutual negligence, has in this country been applied to *canal boats.* The "Canal Regulations" in New York have adopted, for the regulation of canal navigation, what is essentially the American law of the road;[3] that is, when boats meet on the canals, it is the duty of the master of each to turn out to the right hand, so as to be wholly on the right side of the centre of the canal.[4] If at the time of a collision of two boats, either of them, through negligence or design, are near the centre of the canal, neither having turned sufficiently to the right, whatever injury results is the common fault of both parties, and the owners of each boat must submit to the injury done to them, in consequence of the mutual

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[1] By the Common Law, the liability to *contribution*, of cargo on board the wrong-doing vessel, could only lead to *circuity of action*, inasmuch as the freighter might recover the amount paid by him, from the owners of the vessel. But an action may be maintained by the owner of goods lost or damaged by collision, against the owners of the vessel which can be proved to have been in fault. Abbott on Shipp. (5th Am. ed.) 313. As between the owners and the freighter, in cases of accident, the injury caused by a collision, is a "peril of the sea" within the usual exception of the charter-party. Ib.; Buller *v.* Fisher, 1 Esp. R. 67. And, in one case, a loss resulting from collision occasioned by gross negligence, was also held to have occurred by "perils of the sea." Smith *v.* Scott, 4 Taunt. R. 125. See *ante*, § 166.

[2] Kennard *v.* Burton, 12 Shep. (Me.) R. 39.

[3] When two persons are travelling with carriages on the road, and are about *to meet* and *pass each other*, each is bound to pass to the right of the centre of the *travelled* road, and in so doing to use ordinary care and caution; and if one of them, by omitting this care and caution, be injured in his person or property, he is without legal remedy. See *ante*, § 549, *et seq.*; Palmer *v.* Barker, 2 Fairf. (Me.) R. 338.

[4] 1 New York Rev. Stat. 248, § 154; Ib. 695, § 1.

default. Every boat navigating the New York canals is also required to carry conspicuous lights on its bow; and a want of lights on the bow is negligence.[1]

§ 638. But it is to be observed, that, in cases of mutual negligence, the plaintiff will be entitled to recover if the want of ordinary care, on his part, *did not contribute* to produce the injury. In the language of Coleridge, J., to the jury, — "If the plaintiff's servants substantially contributed to the injury, by their improper or negligent conduct, the defendants would be entitled to their verdict; but if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to a verdict."[2] This was the case of a brig carrying her anchor in a position contrary to the by-laws of the river Thames, at the time when she came into collision with a barge; and it was held, that the improper

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[1] Rathbun *v.* Payne, 19 Wend. (N. Y.) R. 399. But there may be a *third* boat concerned, and there is a duty towards her to be attended to. Under the 7th section of the Act of Pennsylvania of April 10, 1826, where an ascending and descending boat have to pass each other, near to, or at a narrow place in a canal, constructed under the laws of the State for inland navigation, it is the duty, *as between themselves*, of the ascending boat to wait at such distance from such narrow place as to permit the descending boat to pass with safety; and if any injury be sustained by the descending boat, through a non-compliance with the law on the part of the ascending boat, the latter is liable for such injury. But where a boat of *a third party*, moored properly to the bank of a canal for a lawful purpose, is concerned, and the ascending boat will not comply with the directions of the act of the State, it is held to be the duty of the persons having the charge of the descending boat, to keep her at a proper distance, and under their control, so as to insure safety; and if, through culpable negligence, or a want of due caution in passing each other, a collision takes place, through and by which, the descending boat is driven against, and staves in, such third boat, the owners or persons in charge of the descending boat are answerable in damages for the injury sustained by such third boat. Sherrer *v.* Kissinger, 1 Barr. (Penn.) R. 44.

[2] Sills *v.* Brown, 9 C. & Payne, R. 601.

carrying of the anchor would not, of itself, be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although, but for the position of the anchor, the collision would not have produced the injury complained of. Coleridge, J., told the jury, if they thought the mischief was occasioned by any want of skill, or by any negligence or improper conduct whatever, on the part of the men on board the brig, without the men on board the barge having substantially contributed to produce it, then the plaintiff would be entitled to their verdict. On the other hand, if they thought that the men on board the barge substantially contributed to the mischief, to its happening, to its taking place, then the defendant would be entitled to a verdict.[1] Where the claim of the defendant, in an action for an injury to the plaintiff's steamboat was, that the injury was occasioned by the neglect of the officers and crew of such boat to keep up lights according to the statute; and the Court charged the jury, that if such officers and crew were guilty of negligence, either in respect to the lights or otherwise, to such a degree as essentially to contribute to the injury complained of, the plaintiff could not recover; it was held, that the charge was unexceptionable; and the Court, in giving their opinion, expressly sanction the rule as above laid down by Coleridge, J.[2] In short, the result of the cases clearly is, that although there has been negligence on both sides, the plaintiff may be entitled to recover, inasmuch as the fault of the plaintiff, in order to

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[1] One of the jury asked, whether they were not told, that the way in which the anchor was placed had nothing to do with the question. Coleridge, J. — "No. You must have misunderstood my observations, if that was the impression you received. The position of the anchor will not be sufficient to make the defendant liable, if the plaintiff, by his servants, substantially contributed to *the occurrence* of the injury, *not to its amount*, but to *the occurrence of it*." The verdict was for the defendant.

[2] New Haven Steamboat Company *v.* Vanderbilt, 16 Conn. R. 420.

prevent his recovering, must be one directly *tending to produce the injury.*[1]

§ 639. In an action against the owner of a brig, for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of £500, and the jury gave a verdict for £250 only; and on being asked how they made up their verdict, they replied, that, in their opinion, there were faults on both sides. It was held, that, notwithstanding this, the plaintiff was entitled to a verdict, as there might be faults in the plaintiff *to a certain extent*, and yet not to such an extent as to prevent his recovering.[2] The verdict in this case, as well as the opinion given by C. J. Tindal, is sustainable in point of law, according to the case of Bridge *v.* The Grand Junction Railway Company,[3] which was an action on the case for the negligent management of a train of railway cars; and Mr. Baron Parke said, "There may have been negligence in both parties, and yet the plaintiff may be entitled to recover."

§ 640. Indeed, in cases of injury done by one vessel to another by collision, or other means, the authorities warrant the position, that *the jury may take an equitable view of the facts and circumstances;* as was expressly held in Smith *v.* Dobson.[4] That case was an action to recover damages for the upsetting of a barge laden with coal, and it appeared that a small steam-vessel belonging to the defendants, and called the "Water Lily," was proceeding down the river, preceded by a larger one, called the "Ramona," and that, in conse-

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[1] Kennard *v.* Burton, *ub. sup.;* Rathbun *v.* Payne, 19 Wend. (N. Y.) R. 399; Marriott *v.* Stanley, 1 Scott, New R. 392; and the note to the case of Raisin *v.* Mitchell, 9 C. & Payne, R. 613; Collinson *v.* Larkins, 3 Taunt. R. 1; Luxford *v.* Large, 5 C. & Payne, R. 421.

[2] Raisin *v.* Mitchell, 9 C. & Payne, R. 613.

[3] Bridge *v.* Grand Junction Railway Company, 3 M. & Welsb. R. 244.

[4] Smith *v.* Dobson, 3 Scott, New R. 336; S. C. 3 Man. & Grang. R. 59.

quence of the swell, occasioned by one or both these vessels, the plaintiff's barge was swamped and the coals lost. The amount of damage was about £80; but the jury returned a verdict for only £20, assigning as a reason for giving only that sum, that they did not think the "Water Lily" to have been the sole cause of the accident. Erskine, J., said, — "The jury might well conclude, that the 'Water Lily' had at least contributed to the accident, and, if so, though the swell occasioned by the defendant's vessel would not, in all probability, have caused the barge to sink, if the water had not been previously agitated by the passing of the 'Ramona,' still the owners of the 'Water Lily' *were in strictness liable for the whole damage.* The jury, however, taking an equitable view of the facts, evidently thought it not fair to make the defendants pay for an injury which was only in part attributable to them." The Court refused to interfere with the verdict.[1]

§ 640 *a.* The *weakness* of the vessel injured by collision is no protection to the owners of the other vessel if they have been guilty of negligence; and the circumstances may be such as to require even more than ordinary care on their part. In an action on the case founded on the allegation, that the plaintiffs being possessed of a boat tied to a wharf, and the defendant being possessed of another boat, did, by himself and servants manage his boat so carelessly, that it ran against the plaintiffs' boat, whereby she was sunk, &c. The collision occurred in removing the defendant's boat from a position above to one below that of the plaintiffs' boat, in doing which the defendant's boat necessarily passed outside of the plaintiffs'. There being evidence conducing to prove that the plaintiffs' boat was not so strong as boats ordinarily were, in which very heavy articles were transported in the

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[1] And per Coltman, J., — "The foreman is to give in the verdict, but he has no power to qualify that verdict by any observation he may think fit to add."

river, the principal question was as to the effect which this fact should be entitled to in determining the liability of the defendant, or the degree of diligence to which he was bound in removing his boat. It was held, that the weakness of the boat injured by collision afforded no protection against the defendant's want of proper care; but that as the weakness rendered the boat more liable to injury from collision, it demanded greater vigilance and precaution on the part of those who knew the fact.[1]

§ 641. The above cases illustrate the Common Law in respect to damage resulting from a collision of one vessel with another, when it has resulted from the negligence or mismanagement of the master or crew of both vessels. In the Admiralty, before which Court misfortunes of this kind have been frequently the subject of controversy, the loss, as has before been stated, must be apportioned between the parties, as having been occasioned by the fault of both of them.[2] There has been much difference in the codes and authorities in maritime law, whether the cargo, as well as the vessel, was to contribute to the loss.[3] But in Le Neve *v.* Edinburgh and London Shipping Company,[4] the cargo of the ship that was sunk and lost by the collision, received the benefit of the contribution; the House determining, after the address to them by Lord Gifford, that both vessels were in fault.[5] Lord Denman, adverting to the occasional hardship

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[1] Inman *v.* Funk, (Co. of Appeals of Kentucky,) 7 Mon. (Ken.) R. 538.

[2] Abbott on Shipp. (5th Am. ed.) 303. We have before seen, that by an act of Congress the jurisdiction of the District Courts of the United States has been extended to certain cases upon the *lakes*, (see *ante*, § 610 *a.*) For a precedent of a libel in a case of collision under this act, see Appx. p. xci.

[3] Ibid. 300–314; 3 Kent, Comm. 231; Story on Bailm. § 607–611.

[4] Le Neve *v.* Edinburgh and London Shipping Company, a case brought to the English House of Lords from the Courts of Scotland, and cited in 1 Bell, Comm. 581; and Abbott on Shipp. *ub. sup.*

[5] The decree stated, that "The Lords find, that the appellants are liable

of the principle, says, "It grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor possibly not quite consistent with it."[1] Kent, in his Commentaries, speaks after Clairac,[2] of the rule as *rusticum judicium*.[3] But collision, in the open sea, is comparatively rare, and generally accidental, while in roads, and in confined navigations, it is a disaster of frequent, and seldom of blameless, occurrence; and "there is no better means," says Valin, (adopting the reasoning of the Jugemens d'Oleron,) "of making the masters of small vessels, which are liable to be injured by the slightest shock, attentive to avoid collision, than to keep the fear of paying for half the damage constantly before their eyes."[4]

§ 642. Lord Stowell, in the case of the Woodrop Sims,[5] states *four* possibilities under which collision may occur. "In the *First* place, it may happen without blame being imputed to either party, as where the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.[6] *Secondly*,

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to the respondents, in the sum of £1535 16*s*., one half the value of the Wells and cargo, such half not exceeding the value of the Sprightly and her freight." The Court of Admiralty, says Story, (Story on Bailm. § 607, n. 3,) continues to act upon this rule, "as the sound doctrine of the maritime law;" and he refers to De Vaux *v*. Salvador, 4 Adol. & Ell. R. 420; and he says the rule of the Admiralty was fully recognized by Judge Hopkinson, in Reeves *v*. The Ship Constitution, Gilp. R. 579. He also refers to 2 English Monthly Law Magazine, 607; 4 Ib. 88; 5 Ib. 45; 8 Ib. 446; 5 Ib. 303.

[1] De Vaux *v*. Salvador, 4 Adol. & Ell. 420.

[2] Cleirac, Us et Coutumes de la Mer, 68.

[3] 3 Kent, Comm. 231.

[4] Abbott on Shipp. (5th Am. ed.) 306.

[5] The Woodrop Sims, 2 Dods. R. 83.

[6] See Story on Bailm. § 608; Reeves *v*. The Ship Constitution, Gilp. R. 579; Steamboat Co. *v*. Whilldin, 4 Harring. (Del.) R. 228; Cum-

a misfortune of this kind may arise, where both parties are to blame, or where there has been want of due diligence or of skill on both sides: in such case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. *Thirdly*, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. *Fourthly*, it may have been the fault of the ship which ran the other down, and in this case the innocent party would be entitled to an entire compensation from the other." If the master or owner of one of the colliding vessels is unwilling to bear his own loss, and desires to fix it upon the other, he may seek his remedy in the Court of Admiralty, (commencing with the arrest of the vessel,) or in a Court of Common Law; and if he can prove that the master of the defendant's vessel was alone in fault, or that no want of ordinary care or skill, on his own part, contributed to the misfortune, he will be entitled, in either tribunal, to recover a full compensation.[1]

§ 643. It is very obvious, that in all cases of collision, the

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mings *v.* Spruance, Ibid. 315. In cases of collision of vessels occasioned by *stress of weather*, and neither party is in fault, the owner of the injured vessel must bear the loss. 1 Dev. (Texas) R. 30.

[1] Abbott, &c. *supra*. "In cases of collision," says Story, "where a loss is caused by the fault of one of the ships only, the general maritime law exacts a full compensation, to be paid out of all the property of the owners of the guilty ship, upon the common principle applied to persons who undertake the conveyance of goods, that they are answerable for the conduct of the agents whom they employ; and the other parties who suffer the damage, place no trust in these agents, and can exercise no sort of control over their acts. To this rule England for a long time conformed. But Holland, having for the protection of its own navigation limited the remedy against the owner to the value of the ship, freight, apparel, and furniture, England has recently followed the example, and established by statute a like limitation. (See *ante*, § 90.) In America no positive enactment has been made; and, therefore, the responsibility of the guilty ship and its owners stands upon the general maritime law." Story on Bailm. § 608 *d*. But see *ante*, § 90.

essential inquiry is, whether measures of precaution are taken by the vessel which has ran down the other; and it is obvious, also, that the question is one partly of nautical care and skill, and partly a question of nautical usage.[1] Where the evidence on both sides is conflicting and nicely balanced, a Court of Admiralty will be guided by the probabilities of the respective cases, which are set up. *A priori*, the presumption is, that the master of a vessel would do what was right, and follow the regular and correct course of navigation. In the case of the Mary Stewart,[2] which was a case of collision the testimony of the witnesses on the one side and the other was so conflicting, that the Court requested the opinion of Trinity Masters upon the probabilities of the respective statements in issue. If a vessel be at anchor, with no sails set, and in a proper place for anchoring, and another vessel, under sail, occasions damage to her, the latter is liable. On the other hand, if the place of anchorage is an improper place, the owners of the vessel which is thus injured must abide the consequences of the misconduct of the master. A vessel ought not to be moored and lie in the channel or entrance to a port except in cases of necessity; and if so anchored from necessity, she ought not to remain there any longer than the necessity continues, and by so doing, and a collision occurs, with a vessel entering the harbor, she will be considered in fault.[3] In a suit in the Admiralty, it was given in evidence for the libellants, that the ship Harriet, after sailing from New Orleans, passed over the bar through one of the passes or outlets of the Mississippi River, and came to anchor near the bar. Another ship, the Louisville, lying below a distance of several miles, weighed anchor with a

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1 Story on Bailm. § 611; The Friends, 1 W. Rob. R. 478; General Steam Navigation Co. *v.* Tonkin, 4 Moore, R. 314; Steamboat Company *v.* Whilldin, 4 Harring. (Del.) R. 228; Lowry *v.* Steamboat Portland, *post*, § 655, 662.

2 The Mary Stewart, 2 W. Rob. R. 244.

3 The Sciota, Daveis, (Dist. Co.) R. 359.

fresh and favorable wind for coming in, through the same pass. As the Louisville approached the bar, the wind died away, and the current being stronger than usual, owing to a strong wind from the south the night before, she drifted and so ran afoul of the Harriet. These passes, it appeared, are intricate and difficult to navigate, and subject to counter and under currents; and if the wind dies away when a ship is coming in, she is certain to drift and become unmanageable. The question, under these facts, was, whether a prudent master would anchor his vessel so immediately in the thoroughfare as did the Harriet; and that, too, after having been run afoul of by another vessel a year before, at or near the same place. The District Court decreed in favor of the libellants, and against the Louisville, her tackle, &c. The decree was, however, reversed in the Circuit Court with costs, in which the opinion of Mr. J. McKinley was, that the third rule above mentioned of Lord Stowell, viz., that the sufferer must bear his own burden under his third possibility under which a collision may occur, applied with great force to the case under consideration. It was admitted by the learned Judge, that the opinions of some nautical men, found in the evidence, showed that it was possible for the Louisville to have avoided the collision, had every thing been done that it was possible to do. But, said he, "the law imposes no such diligence on the party in this case; so far as the Harriet was concerned, the Louisville was entitled to the full use of the thoroughfare of the pass; the master of the Harriet having obstructed it, with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellees of the right of action against the appellants."[1] On appeal by the libellants to the Supreme Court, that Court being equally divided in opinion, the judgment of the Circuit Court was affirmed. If in this case the anchor had been too light to hold the ship, and she consequently had dragged it,

[1] Strout *v.* Foster, 1 How. (U. S.) R. 89.

and she thereby had run against the other vessel, the responsibility of the loss would have fallen upon the owners of the anchored ship, inasmuch as she would have been negligently and improperly anchored.[1]

§ 644. The anchorage of a vessel should always be properly taken up, and the anchor sufficiently large, and if not so, and a collision is the consequence, the blame must be imputed to the master; whereas, if the collision arose merely from the violence of a squall, it will then be the result of inevitable accident. A commander of a ship was condemned in the Admiralty in a cause of damage, the collision having been occasioned by his anchoring too near the damaged vessel; and having anchored with only one anchor, the weather being squally and tempestuous.[2] The owners of a vessel, disabled by the negligence of its crew, are clearly answerable for damage done by its accidentally drifting, when so disabled, against another vessel.[3]

§ 644 *a*. There is no doubt that a vessel in motion is bound to steer clear of a vessel at her moorings, and that nothing can excuse her from making compensation but unavoidable accident, the *vis major* which no care can guard against;[4] for it is the duty of every vessel seeing another at anchor, whether in a proper or an improper place, and whether properly or improperly anchored, to avoid, if practicable and consistent with her own safety, any collision.[5] It may, perhaps, be stated as an established general rule, that a vessel entering a harbor in the *night time* is put on her utmost vigilance; and this is more especially so, if the port is one much resorted to in bad weather, as a harbor of refuge,

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1 The Massachusetts, 1 W. Rob. R. 71.
2 The Volcano, 2 W. Rob. R. 337.
3 Seecombe *v.* Wood, 2 M. & Rob. R. 290.
4 The Girolamo, 3 Hagg. R. 173.
5 The Batavier, 10 Jur. 19.

and when it is reasonable to expect that the harbor will be crowded with water-craft. The master and crew should be on deck, and in such parts of the vessel as to be able to control her motions, and to see any vessel that lies in her track, and which they may be approaching. And, always when a collision takes place between a vessel under sail and one at anchor, the *primâ facie* presumption, if there be any fault, is that it is on the part of the vessel which is under sail.[1]

§ 645. If a vessel chooses to avail herself of a particular mode of going down a river, at a particular time, which renders it difficult to escape a collision, she must bear the consequences of a contingency to which she has exposed herself. Thus, a plea in the Admiralty, in a cause of damage, that the ship causing the collision was being warped down the river at the time, and in consequence could not get out of the way was overruled.[2]

§ 646. The laws of Oleron and of Wisbuy made it the duty of a master of a vessel always, when in port, to keep a *buoy* to his anchor, and rendered him liable for all damage caused by a neglect to do it.[3] It has been held at Common Law, that if a vessel is sunk by *inevitable accident*, in a public navigable river, and without, therefore, any fault on the part of the owner, a *buoy* must be placed over it for the common safety; and this was held by Lord Ellenborough to be the only proper and specific notice, and the one which all persons understand and are bound to attend to. Although the party, in such case of inevitable accident, is not liable to indictment for not removing the wreck, yet he is liable for damages in a

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[1] The rule is so stated by Boulay Paty, Droit Maritime, tit. 12, s. 6, vol. 4, p. 492, and recognized in the Sioto, Daveis, (Dist. Co.) R. 359; The Neptune, 1 Dod. R. 467.

[2] The Hope, 2 W. Rob. R. 8.

[3] Laws of Oleron, Art. 14; Laws of Wisbuy, Art. 28; and see 1 Pet. (Adm.) R. Appx. 28, 78, 85.

civil action occasioned by a neglect of such notice; a verbal communication by a person stationed near the spot of the sunken vessel, is an admonition liable to be misunderstood, and is not a sufficient warning.[1] But it has been considered remarkable that Lord Ellenborough should have *assumed* such to be the law.[2] And in Brown *v.* Mallett in the English Court of Common Pleas, in 1848,[3] it was expressly held, that where a vessel is sunk by inevitable accident, or without any fault on the part of the owner or his servants, in a navigable river, and remains there under water, no duty is cast upon the owner to use any precaution, in the absence of any positive enactment to that effect, by placing a *buoy* or otherwise; and that the owner, therefore, is not liable either to an indictment, or to an action at the suit of a party sustaining special damage in respect of such omission. Such an obstruction is indeed incident to commerce, and when not the result of negligence, is not unlawful, and imposes no duty; for the vessel, without his fault, has been put beyond the control of the owner, and he has been an innocent sufferer.[4] Ships of the larger class and tonnage, when deeply laden, have often grounded in ascending and descending the river Delaware; but it has never been considered an illegal obstruction of the channel, or a public nuisance, if ordinary care has been exercised.[5]

§ 647. In many ports there are Trinity House regulations, requiring vessels at anchor in a navigable river, or port of much commerce, to have a *light* hung out conspicuously in dark nights;[6] and the boats navigating the New York canals,

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1 Harmond *v.* Pearson, 1 Campb. R. 515.

2 Per Maule, J. in Brown *v.* Mallett, 5 Man. Grang. & Scott, R. 599.

3 Ibid.

4 Rex *v.* Walls, 2 Esp. R. 675.

5 Cummins *v.* Spruance, 4 Harring. (Del.) R. 315.

6 3 Kent, Comm. 230, note (c). Though it has never been laid down as a general principle, by the English Court of Admiralty, that *merchant* vessels ought *constantly* to carry lights. The Rose, 2 W. Rob. 4; Columbine, Ib. 33.

we have seen, are subject to a like regulations, in order to avoid injury in their passing each other.[1] By the act of Congress also, providing for the better security of the lives of passengers on board of vessels propelled by steam, it is made the duty of the master and owner of every steamboat running between sunset and sunrise, to carry one or more signal lights;[2] and by the English Statute 9 & 10 Vict. c. 100, s. 9, every steamer in any river, or narrow channel in Great Britain or Ireland, or in the sea within twenty miles of the coast, is required to exhibit signal lights between sunset and sunrise.[3]

§ 648. The very fact, that there have been as many instances of imposing by statute upon masters of vessels the obligation of carrying, in dark nights, lights conspicuously hung out, and prescribing a penalty for disobedience, argues culpable negligence in the omission of it, if there were no posi-

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[1] *Ante*, § 637.

[2] Act of Congress of 1838, chap. 191, s. 10. See the Act in the Appx. p. lxxxiv.

[3] The section referred to reads as follows: The master or other person having charge of any steam-vessel in any river or narrow channel in Great Britain or Ireland, or the adjacent islands, or in the sea within twenty miles of the coast, shall, whether under weigh or at anchor, between sunset and sunrise exhibit such lights in such manner, and under such circumstances as by the regulations therein authorized to be made by the Lords Commissioners of the Admiralty, shall be required under a penalty of not exceeding 20*l.* for each night's default. And the owner of any steam-vessel in which such light shall not be so exhibited, shall not be entitled to recover any recompense or damage whatever which may be sustained by such vessel in consequence of any other vessel running foul thereof during the night. By section 13, if any damage to any person or property shall be sustained in consequence of the non-observance as respects any steam-vessel, of the rules in this Act contained, relative to steam-vessels passing each other and exhibiting lights at night, the same shall in all Courts of justice be deemed, in the absence of proof to the contrary, to have been occasioned by the wilful default of the master or other person having the charge of such steam-vessel, and such master or other person shall be subject in all proceedings, whether civil or criminal, to the legal consequences of such wilful default.

tive regulation upon the subject. In reference to the Act of Congress mentioned in the preceding section, Wayne, J. has said, that besides the penalty it prescribes, "if neglect or disobedience of it shall be proved to exist when injury shall occur to persons or property, it will be thrown upon the master and owner of a steamboat, by whom the law has been disregarded, the burden of proof, to show that the injury was not the consequence of it."[1] It was said by the Court in Carsley *v.* White,[2] that there was no general and absolute *usage* on this subject, and that the omission of a light might or might not be a fatal negligence, according to the circumstances. That was an action on the case, by the owners of a fishing smack against the owners of a vessel, to recover damages alleged to have been occasioned by the negligence and unskilfulness of those who had charge of the defendant's vessel, in running against the plaintiff's vessel whilst lying at anchor in Provincetown harbor. There was no light burning on the deck of the plaintiff's vessel, but it was (although cloudy and misty) light enough for a seaman to discern a vessel at anchor at a considerable distance. It was contended, for the defendants, that it was necessary for the plaintiffs to show that they had a light on their deck, and requested the Judge so to instruct the jury. But he instructed them, that whether the plaintiffs ought to have a light on deck, *depended on the circumstances of the case*, especially the position of the vessel at anchor, and the state of the light from the heavens; that if the vessel was in the usual place of anchorage, and there was light enough to enable the running vessel, with a good lookout, to see and avoid the vessel at anchor, it was not necessary for the plaintiffs to keep a light on deck; but if she was in an unusual or exposed place, and if it was so dark that a vessel at anchor could not be seen and avoided without a light on deck, it was carelessness not to have one; that what would be suitable and necessary

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[1] Waring *v.* Clarke, 5 How. (U. S.) R. 441.

[2] Carsley *v.* White, 21 Pick. (Mass.) R. 254.

precaution in one situation and state of circumstances, would be insufficient in another. To this instruction the defendants excepted; and if the jury should have been instructed, that it was necessary for the plaintiffs to have had a light on deck, the verdict, which was for the plaintiffs, was to be set aside, otherwise judgment was to be rendered on the verdict. Morton, J., who delivered the opinion of the Court, had no doubt of the correctness of the instructions to the jury; and held, that it was incumbent on the plaintiffs to show that the injury of which they complained, was caused by the misconduct of the defendants, and did not arise from their own negligence. "Whether," said the learned Judge, "common care and prudence required of the plaintiffs to have a light, and the omission to have it amounted to negligence, *must depend on the darkness of the night*, the number and situation of the vessels in the harbor, and all the other circumstances connected with the transaction." This, said he, was a question of fact, within the province of the jury; and as it was submitted to them, with proper comments and instructions, and they had decided it, there was no reason to complain of their decision.

§ 649. It was said in the case of the collision between the Scioto and the Falcon, in the harbor of Portland, (the Falcon lying at anchor there,) one fault imputed to the Falcon, was that of not showing a light. It appeared to the learned Judge, before whom the cause was tried, that if she had showed a light, to be nearly certain that she would have been seen from the Scioto, in approaching her, in season to have avoided the collision. If she had had a light, said he, suspended in a conspicuous place, and a collision had taken place, it would to say the least, have been extremely difficult for the colliding vessel to have excused herself; for, admitting the vessel was anchored in an improper place, her fault would not excuse any want of care and caution in another vessel.[4] That the

[1] By the learned Judge Ware, Daveis, (Dist. Co.) R. 368.

hoisting of a *light* in a river or harbor at night, *amid an active commerce*, was a precaution imperiously demanded by prudence, and the omission of it is not to be considered otherwise than as negligence *per se*, was held by the Chief Justice of Pennsylvania, in Simpson *v.* Hand.[1] That was an action on the case to recover damages for injury done to goods on board of a vessel while she was lying at anchor in the river Delaware, by a vessel coming up the river in the night time; and the Court held, that if the anchored vessel was moored in the channel of the river *without a visible light* burning at the time, or *if her watch was not on deck*, and did not do what was customary for the purpose of avoiding a collision, there was such negligence as to bar the action; though there might have been negligence on the other side.

§ 650. Nothing is better settled in the Admiralty than that, in dark and foggy nights, measures of strict precaution are expected on the part of a master of a vessel, in order to avoid chances of collision; and if, amid nocturnal darkness or fog, a vessel should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution, that would have rendered the accident less probable. However important it may be that a voyage should be completed in the most speedy manner, such speed must be combined with safety to other vessels. This is the expressly declared doctrine of the Courts of Admiralty, and was applied to the case of the Virgil, which vessel, sailing upon a dark and foggy night, with her topmast studding-sails set, and coming into collision with the sloop Jean, was con-

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[1] Simpson *v.* Hand, 6 Whart. (Penn.) R. 311. That opinion approved by Kent, 3 Kent, Comm. 230, n. c. (6th edit.); and Steamboat Co. *v.* Whilldin, 4 Harr. (Del.) R. 228.

demned in the damage sued for.[1] But in the case of the Ebenezer, it was held, that a vessel running free with a fair wind, and carrying her square sail, topmast studding-sail, fore-and-aft mainsail and gaff topsail set, the weather being dark and thick, and the night foggy, the case was dismissed in the Admiralty upon the ground of inevitable accident. This case shows how much depends upon the courses of two vessels, &c., and the Court thought there were many difficulties in the case, which might have misled both parties. It was also stated in behalf of the Ebenezer, that the reason she carried so much sail as she did, was, that a very large number of vessels were immediately in her wake, and that she carried the sail in question for the purpose of avoiding the possibility of any of the vessels running into her.[2] In the case of the Itinerant, the Court said: — "It is unquestionably the duty of every master of a ship, whether in an intense fog or great darkness, to exercise the utmost vigilance, and to put his vessel under command so as to secure the best chance of avoiding all accidents, even though such precautions may occasion some delay in the prosecution of the voyage. It may be, that, for such a purpose, it would be his duty to take in his studding-sails; *but such is the constantly varying combination of circumstances, arising from locality, wind, tide, number of vessels in the track, and other considerations, that the Court cannot venture to lay down any general rule, which would absolutely apply in all cases.*"[3]

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[1] The Virgil, 2 W. Rob. R. 201. In an action on the case for running down the plaintiff's brig, it was proved that the defendant's vessel was sailing in the channel before the wind having her studding-sails set at night, and that the plaintiff's brig was sailing by the wind, and the jury found a verdict for the defendant. The Court granted a new trial for the purpose of further investigating the facts, as there was some doubt as to the propriety of carrying studding-sails at such a time and in such a place, and also as to whether the defendant's captain had kept a proper look-out. Jameson *v.* Dunkeld, 12 Moore, R. 148.

[2] The Ebenezer, 2 W. Rob. R. 206.

[3] The Itinerant, 2 W. Rob. R. 236.

§ 650 *a*. Steamers, being more under control than sailing vessels, their duty in regard to avoiding collision can be more definitely stated.[1] A large steamer proceeding on a dark night in the Frith of Clyde, a very thronged thoroughfare, at the rate of from twelve to fourteen miles an hour, came in collision with a small schooner, which, being deeply laden, and proceeding against the tide with a very light wind, had very little way on her, and was, therefore, incapable of altering her position. The schooner showed no lights and was not discovered by the steamer until close upon her, when a collision ensued, in consequence of which the schooner almost immediately sunk. It was held, that, under the circumstances, the steamer was responsible for the damage, *her watch and look-out* (though sufficient, under ordinary circumstances,) *not being sufficient* considering the darkness of the night, and the *rate of speed* of the steamer.[2] A large steamer on her voyage from Kingston to Liverpool, came into collision at night with an outward bound brig, which, in consequence of the collision, sunk immediately, with some of her crew. The night was dark, and the place of collision was a part of the Channel constantly navigated by vessels. The steamer was going at full speed; she carried lights, and had but one man on her look-out station. Although the brig carried no lights properly so termed, it was held that the steamer, in going at full speed, *on such a night, in such a locality, and with one man only on the look-out,* was improperly navigated and liable to the whole damage.[3] Steam-vessels, under such circumstances, are not justified by the English Court of Admiralty in going at the rate of ten knots an hour; if one, going at that rate, come into collision with another vessel, without either party seeing each other, the steamer will be

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[1] See *post*, § 656, 657, 663. A steamboat can be stopped in nearly her whole length. The Perth, 3 Hagg. R. 417.

[2] The Londonderry, High Court of Admiralty of Ireland. Pritch. Adm. Dig. 129.

[3] The Iron Duke, 9 Jur. 476.

held responsible for the damage.[1] To constitute a good *look-out*, there must be a sufficient number of persons stationed for the purpose, who must know and be able to discharge that duty.[2]

§ 651. There is a rule of navigation, in respect to sailing vessels, which undoubtedly had its origin in the customs of navigation, and the obligation it imposes is thus stated by Lord Stowell to the Trinity Master, in the case of the Woodrop Sims,[3] "that the law imposed upon the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel close hauled, and of showing that it had done so; if not, the owners were responsible for the loss which had ensued. If they thought proper precautions were taken on board the Woodrop, then it would be necessary to inquire whether the measures were counteracted and defeated by improper measures taken by those on board the other ship." We have seen that the remedy in cases of collision lies either in the Courts of Common Law, or in the Admiralty Court, and in Handyside *v.* Wilson, at Nisi Prius,[4] the jury found the rule to be, that the ship which is going to windward is to keep to windward, and that ship that has the wind free is to bear away. In a case in the Exchequer, Bayley, B., said, that the party who has the wind should give way, and it is expected he will make room.[5] Therefore, a vessel sailing with the wind is bound to give way to one sailing by the wind; and the vessel sailing by the wind, is not in ordinary circumstances obliged to alter her course.[6] It was held in the High Court of Admiralty,

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[1] The Rose, 2 W. Rob. R. 2. See also The Perth, 3 Hagg. R. 414.

[2] The George, 9 Jur. 670; Jameson *v.* Dunkeld, 12 Moore, R. 148.

[3] The Woodrop Sims, 2 Dod. R. 83; and see Waring *v.* Clarke, 5 How. (U. S.) R. 441.

[4] Handyside *v.* Wilson, 3 C. & Payne, R. 528.

[5] Vennall *v.* Garner, 1 Crompt. & Mees R. 21.

[6] Jameson *v.* Dunkeld, 12 Moore, R. 148; Steamboat Co. *v.* Willdin, 4 Harring. (Del.) R. 228.

in the case of the Hope, that where a light vessel, with the wind free, meets with a laden vessel, close hauled, it is the duty of the former to give way, and the latter is to keep her course; and if the night is so excessively dark, that the persons on board the former vessel could see only a short distance from the vessel, this circumstance would only render it the more incumbent upon the crew to keep a good look-out, and not to depart from the general rule, unless compelled to do so by absolute necessity. Whoever sets up an exception to the rule, so important as the general rule, is bound to prove that facts and circumstances occurred, which rendered the rule itself no longer applicable.[1]

§ 652. We have seen, that in the case of carriage of passengers by land, the established rule in England is, that in meeting, each party shall bear or keep to the left, and that in this country the established rule, that each party shall bear or keep to the right.[2] Were it left to chance, or to the hasty

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[1] The Hope, 1 W. Rob. R. 154. See Sills *v.* Brown, 9 C. & Payne, R. 601. In the case of the De Cock, in the High Court of Admiralty, the Parmelia was proceeding up the channel, east by north, and the De Cock was coming down the channel, her course being northwest. The wind was nearly southwest; therefore, the Parmelia, which was sailing on the starboard tack, had the wind free. The night was dark and hazy, and although a good look-out was kept on board both vessels, a collision took place. Dr. Lushington put the following questions to the two elder brethren of the Trinity House, by whom the Court was assisted. *First*,— "Whether, under the circumstances of the case, the Parmelia, sailing up channel, with the wind free, ought not, immediately on perceiving the De Cock, to have given away?" Answer, — "She ought to have altered her course." *Secondly*, — "Then, suppose it was so, ought the De Cock, seeing this state of things, to have attempted to luff up, or have kept her course, or have put her helm to port as she did?" Answer, — "It was wrong to put her helm to port." The Court held, upon these answers, that both vessels were to blame, and directed the amount of damage done by the De Cock to be brought in and divided, and each party to pay their own expenses. 22 Am. Jurist, 464. See also the case of the Speed, 2 W. Rob. R. 225.

[2] *Ante*, § 549.

judgment of the moment, to choose the side each opposing carriage is to take, all safety would be gone; but as it is, the most casual observer in a populous English or American city must be struck by the precision with which the vehicles crowding its streets pass to and fro without injury or contact.[1] Ships at sea require a rule as well as carriages on land, but unfortunately they cannot be as easily comprehended, and are of much more difficult practical application. "The combination of circumstances, in which two meeting vessels find themselves, may be extensively varied by the state and direction of the wind, and the relative position of the vessels towards the wind and towards each other."[2] It appears, that an order promulgated by the Trinity House Corporation in England, on the 30th of October, 1840, provides as follows: "Whereas the recognized rule for sailing vessels is, that those having the wind fair shall give way to those on a wind; that when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand; that when both vessels have the wind large or abeam and meet, they shall pass each other in the same way on the larboard hand, to effect which two last mentioned objects, the helm must be put to port."[3] The replies elicited

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[1] See Art. in Westm. Review, Sept. 1844, p. 60.

[2] Westm. Review, *supra*.

[3] Explanation of the sea phrases used in the above order, and in the adjudged cases. — *Bear-up*, or *Bear-away*. To put the helm *up* (or to the windward or weather side) and keep a vessel away to leeward. *On a wind*, *Close hauled*, *on a Bowline*. Applied to a vessel which is sailing with her yards braced up, so as to get as much as possible to windward. *Large* — *Free*. Applied to a vessel sailing with a fair wind. *Larboard*. The left side of a vessel looking forward. *Lee*. The side opposite to that from which the wind blows. *A-lee*. The situation of the helm when the tiller is put to the lee side. *Leeway*. When a vessel loses by drifting to leeward. *Luff*. To put the helm *down*, (or to the lee side) so as to bring the ship nearer the wind. *Port*. To port the helm is to put the tiller to the larboard side. *Starboard*. The right side of a vessel looking forward.

by questions addressed to witnesses by the select committee of Parliament on *shipwrecks*, state, as one of the causes of the many casualties happening by the collision of vessels at sea, the *ignorance of, or inattention to, the Trinity Rules*.[1] Although deriving their force from the Trinity Board, those rules are not really enacted by that corporation, being of date older far than its charter; but notwithstanding they are of immemorial authority, they have been so much doubted and misunderstood, that they seem to be attended by the uncertainties of oral tradition; and the only authoritative written exposition of them, is derived through the perplexities of an analysis of the successive judicial decisions in the High Court of Admiralty;[2] and in truth they cannot be fully comprehended, and therefore not satisfactorily discussed by one who has never known how to "hand," nor "reef," nor "steer." They by no means constitute a law *per se*, but at the same time they are regarded by the English High Court of Admiralty as of authority.[3] An alteration of a ship's course, being at all times inconvenient, when under sail, the alteration is usually made by one of the two ships only; and the rule is easily understood, that a vessel sailing free shall be the one to give way; and the expression "giving way," means not crossing a vessel's bows, but going under her stern.[4] When two vessels approach each other on opposite tacks, especially when one is close hauled, and the other vessel has the wind free, the rule is that the latter must give way, but if both have the wind against them, the one on the larboard tack must give way, and the one on the starboard tack is to keep her course.[5]

To starboard the helm is to put the tiller to the starboard side. (*Seaman's Manual.*) See Encyclopedia Britannica, Art. "Seamanship."

1 Westm. Review, *supra*. 2 Ibid.

3 2 Kent, Comm. 230; and see the case of The Duke of Sussex, 1 W. Rob. R. 274; The Catharine, 2 Hagg. R. 145; The Ligo, Ib. 356; The Thames, 5 Rob. R. 345; The Dundee, 1 Hagg. R. 109.

4 The Rose, 2 W. Rob. R. 1.

5 The Seringapatam, Pritch. Adm. Dig. 131.

§ 653. Two vessels may not be approaching each other in a straight line, or in any thing like a straight line, and the courses they are pursuing may cross each other angularly. The application of the Trinity House regulations, with respect to two vessels meeting each other, the one upon the larboard and the other upon the starboard tack, depends upon the presumption that the two vessels are directly approaching each other, and is not intended to apply when the heads of the respective vessels are lying in different directions. If one of the vessels is lying with her head to the S. E., and the course of the other is N. N. W. half W., it is obvious that the two vessels are not approaching with their heads opposing each other; and therefore it is held, the rule does not apply to the circumstances of the case.[1] Hence it appears, that no effectual single law can be devised to suit all circumstances, and it is usual to state the existing regulations in the form adopted by the Trinity Board.

§ 654. In the case of the Ann and Mary, it was held, that in doubtful circumstances where there is a probability of collision, a vessel on the larboard tack, although close hauled, is bound to give way to a vessel on the starboard tack, notwithstanding the latter may be sailing with the *wind free.* One peculiar feature in this case arises from the fact, that an action had at Common Law had been brought by the owners of the Ann and Mary, the vessel proceeded against, against the owners of the Lady Clinton, on account of the collision in question; and on the trial of that cause a verdict was found for the plaintiffs.[2]

§ 655. Rules founded on the like usages, and the general

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[1] The London Packet, 2 W. Rob. R. 213.

[2] The Ann and Mary, 2 W. Rob. R. 189. In the case of the Traveller, it was held to be the duty of the vessel on the larboard tack, to give way to a vessel on the starboard tack, without considering whether the other vessel be *one or more points to leeward.* 2 W. Rob. R. 197

convenience of commerce, have been recognized by high authority in this country.[1] In the case of Lowry *v.* The Steamboat Portland,[2] it was certified by experienced navigators, and adjudged by the Court, as the rule on the subject, that when two vessels approach each other, both having a free or fair wind, each vessel passes to the right. The usage in the river Delaware is for vessels having the tide to keep further out; for those stemming the tide, nearer the shore; and such usage it is proper to consider in cases of collision.[3]

§ 656. With regard to *steam-vessels*, they must always back their engines, when hailed in a fog. The steamer Perth was going in a fog with unabated speed on a track frequented by coasters, and there was no order given, when she was hailed, to stop her engines; and she was held liable to the amount and damages and costs in a suit against her for a collision which ensued.[4] In the case of the James Watt, it was held, that where a steamer coming down a river in a dark night, meets a sailing vessel beating up the river, and the master of the steamer is in doubt what course the sailing vessel is upon, it is the duty of the master of the steamer to ease her engines and to slacken her speed, until he ascertains the course of the sailing vessel. In such a case, the defence that the master of the steamer immediately put her helm to port, in compliance with the Trinity House regulations, will not be sustained.[5]

§ 657. As a steam-vessel has greater power and is more under command, she is bound always to give way to a sail-

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1 Story on Bailm. § 611 *a*; 3 Kent, Comm. 230, 231; Rogers *v.* The Brig Rival, (D. Co. Mass.) Law Rep. May, 1845.

2 Lowry *v.* The Steamboat Portland, in the United States Dist. Co. for Mass. 1 Law Rep. 313.

3 Steamboat Co. *v.* Whillden, 4 Harring. (Del.) R. 228.

4 The Perth, 3 Hagg. R. 414. See also the Rose, 1 W. Rob. R. 274.

5 The James Watt, 2 Rob. R. 270.

ing vessel. A steamer is indeed generally deemed as always sailing with a free and fair wind, and is therefore bound to do whatever a common vessel going with a free or fair wind would, under similar circumstances, be required to do in relation to any other vessels, which it meets in the course of the navigation.[1] In the case of the Columbine, it was held, that if a steamer and a sailing vessel are approaching each other, and there is a probability of a collision, the general rule of navigation must be strictly adhered to; and neither haziness, nor the sailing vessel being first descried from the starboard side of the steamer, affords a sufficient justification for the conduct of the steamer in departing from the rule.[2]

§ 658. *Two* steamers may be sailing in *opposite directions*, and there may be a reasonable probability, if they continue their course, of their coming in collision. The regulation of the Trinity House in such case is drawn up with great precision, and is not difficult to comprehend; it is as follows: When steam-vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be risk of coming in collision, each vessel shall put her helm to port so as always to pass on the

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[1] Story on Bailm. § 611 *b*; Steamboat Co. *v.* Whillden, 4 Harring. (Del.) R. 228; The Gazelle, Eng. Jurist, June 3, 1843, p. 497; Hawkins *v.* Dutchess and Orange Steamboat Co. 2 Wend. (N. Y.) R. 452; Lowry *v.* Steamboat Portland, *ub. sup.* In a cause of collision against the Shannon — a steam-vessel — the Court, assisted by Trinity masters, pronounced for damages and costs, holding that the steam-vessel, though on the starboard tack, being more under command, and manifestly having seen the other vessel, was to blame in not having given way. The Shannon, 173. A custom, among the navigators of steamboats, on a river, to preserve particular situations, in ascending and descending, the Supreme Court of Alabama thought, would seem salutary and reasonable, and analogous to the rule governing ships passing each other at sea. Such custom, it was considered, would, if proved, bind navigators of steamboats to its observance, and a failure to observe it would be at the peril of the owners. Jones *v.* Pitcher, 3 Stew. & Port. (Ala.) R. 135.

[2] The Columbine, 2 W. Rob. R. 272.

larboard side of each other." This rule, emanating from the Trinity House, although it cannot be considered as constituting law *per se*, is nevertheless adopted as a rule in the Admiralty; and the English High Court of Admiralty consider it important, that it should be distinctly understood, that they should consider the rule of binding authority upon the owners of steam-vessels. If the masters of such vessels, that Court have announced, shall think fit not to comply with the rule in question, in so doing they will be guilty of unseamanlike conduct, and their owners will be responsible for the consequences that may result from their disobedience of it. But the obvious meaning of the rule is held to be, that it is intended to apply whenever two steam-vessels are approaching each other in contrary directions, and there is a reasonable probability, that, by standing on, a collision may ensue; not, only where such collision is inevitable. If no reasonable apprehension of a collision is to be entertained, and the observance of the rule would *unnecessarily* throw each vessel out of its course, it would be an absurdity to suppose that under such circumstances the rule was intended to apply.[1] Mr. Justice Woodbury, in a case decided in the Supreme Court of the United States, observed, that there is no such rule as that prescribed by the Trinity House, in this country, though he considered the principle on which it rested, a sound

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[1] By Sir Stephen Lushington, in the case of the Duke of Sussex, 1 W. Rob. R. 274. The above-mentioned rule of the Trinity House, requiring steamboats to pass each other on the larboard side, was expressly enjoined by the State of New York more than twenty years ago, by statute. N. Y. Rev. Stat. Part I. tit. 10, § 1. By the Stat. 9 & 10 Vict. c. 100, s. 9, every steam-vessel when meeting or passing any other steam-vessel shall pass as far as may be safe on the port side of such other vessel, and every steam-vessel, navigating any river or narrow channel, shall keep as far as is practicable to that side of the fair-way or mid-channel of such river or channel which lies on the starboard side of such vessel, due regard being paid to the tide, and to the position of each vessel in such tide; and the master or other person in charge of such vessel neglecting to observe such regulations, shall for each default be liable to a penalty not exceeding 50*l*.

one.[1] This meaning undoubtedly is, that no such rule has yet been recognized as obligatory by any authoritative judicial decision. If it should be shown in this country that there is a usage well established to that effect, it may be supposed that our Courts would not hesitate to enforce it.[2]

§ 659. In a cause of collision in the Admiralty, against a steam-vessel, for damage occasioned to her by another steam-vessel, the grounds of defence were twofold: first, an alleged custom, superseding the Trinity House rule; and secondly, that the circumstances of the case were such that the rule had no application in that instance; or, in other words, that the two vessels were pursuing courses so widely distant from each other, that there was no reasonable probability that a collision would have occurred. The facts set forth were, that the steamer Lightning was proceeding up the river Thames, and had arrived in the Half-way Reach, about five miles from Woolwich, when the steamer Duke of Sussex was seen coming down with the tide "end on" towards the Lightning; that when the two vessels had approached to within about a quarter of a mile of each other, it was obvious to the persons on board the Lightning, that if both vessels continued their respective courses, a collision would probably ensue. The helm of the Lightning was accordingly put to port, in conformity with the rule of the Trinity House, but the helm of the Duke of Sussex, instead of being put in like manner to port, was put to starboard, and in a few seconds she ran her bowsprit into the Lightning's paddle-box, breaking the paddle and wheel by the collision. The defence set up by the owners of the Duke of Sussex was, that the tide at the time the collision occurred was about one third ebb; that the full force of the ebb tide was northward of Half-way Reach, and that it was the

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[1] Waring *v.* Clarke, 4 How. (U. S.) R. 441.

[2] Conkl. Adm. Jurisdict. 311.

practice and custom of steam-vessels coming up the river to keep to the south side of the mid-channel, and those going down to adhere to the north side; that the Duke of Sussex was pursuing the usual course, and if the Lightning had done the same, the two vessels might have passed clear of each other; that there was no necessity for the persons on board that vessel to have ported her helm, and it was only in consequence of the Lightning's deviation from the customary rule that the collision was occasioned. Sir Stephen Lushington said: — "Supposing the custom to exist as stated, it can only be acknowledged where there is an open way for each vessel to pass without any risk of a collision. In the present case it is directly averred, on the part of the Lightning, that the two vessels were approaching each other 'end on;' in which case I distinctly lay it down as my opinion, that the rule was to be observed, and the custom, if any such custom exist at all, be superseded. If there be any risk, convenience must give way to the rule; if it were otherwise, the masters of steam-vessels would always be looking out for circumstances to justify them in departing from the rule; the rule would be disregarded for the sake of a little more or less convenience, and the greatest uncertainty would ensue in consequence." With these observations he left the first part of the defence for the Trinity Masters to determine how far it was imperative upon the owners of the Duke of Sussex to observe the rule. Upon the second part of the defence he relied on their judgment to decide whether the two vessels were so far distant from each other, as to render it altogether unnecessary for the Lightning to have ported her helm under the circumstances of the case. If, under the facts disclosed, there was a reasonable probability of collision, he apprehended it was clear that the Lightning acted properly, and that the Duke of Sussex was to blame. The reply of the Trinity Masters was: — "The Lightning was thrown into the middle of the river to avoid some colliers; and, under the circumstances of the case, we think there was such a probability of a collision, that the Lightning

adopted the right course, and the accident was caused by the misconduct of the Duke of Sussex." [1]

§ 660. We have seen, that the rules of the road to be observed by carriers of passengers by land are not inflexible, although, if they are disregarded, more care must be exercised, and a better look-out kept to avoid collision than would be necessary, provided they were strictly observed; [2] and situations and circumstances, it was said, may frequently arise where a deviation from the acknowledged rules would not only be justifiable, but absolutely necessary.[3] The same doctrine is applicable to carriers of passengers by water; and a vessel is not to be run into because she is out of place.[4] Mr. C. Justice Best, in a case of collision of vessels at Nisi Prius, in summing up, said that he agreed, that although there might be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course; but if the matter comes into any doubt, as, for instance, in the case of a dark night, then the rule is to regulate the parties.[5]

§ 661. The rules of the sea, in respect to navigation, it is always admitted, are subordinate to the rule prescribed by *common sense*. Thus, if a vessel goes so near to a rock on the land, that, by following the rules, she would inevitably get on shore, no rule should prevail over the preservation of

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[1] The Duke of Sussex, 1 W. Rob. R. 274.

[2] *Ante*, § 549, *et seq.*

[3] Lowry *v.* The Steamboat Portland, 1 Law Rep. 313.

[4] Cummings *v.* Spruance, 4 Harring. (Del.) R. 315; Vanderbilt *v.* Turnp. Co. 2 Const. (N. Y.) R. 479. Steamboats in the river Mississippi are not necessarily liable for sinking flat boats, by being out of the usual channel, for the purpose of obtaining wood, passengers, or freight; there must be some negligence on the part of the officers of the steamboat, in order to render her liable. Western Belle *v.* Wagner, 11 Missou. R. 30.

[5] Handyside *v.* Wilson, 3 C. & Payne, R. 528.

property or of human life.[1] It was urged in the case of the Hope,[2] that if it was in the power of one of the vessels which came into collision, to have avoided the collision by giving way, she was bound to have done so, notwithstanding the rule of navigation. This the Court admitted to be true, as a general proposition, and said that "no vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the strict rule of navigation." "If a steam-vessel," said the Court, "should, for instance, be nearing another sailing vessel, and such vessel should be steered erroneously; if the master of the steam-vessel should *wilfully* say 'this vessel is steering wrong, but we will keep our course,' and a collision ensues in consequence, I should undoubtedly hold the steam-vessel was to blame." But the steam-vessel would be exonerated if the sailing vessel was steering wrong, and the former did not strictly comply with the rule of navigation if she did all that was reasonable under the circumstances, and a collision *unintentional* should take place between them. A steam-vessel going down channel in a dark night, on seeing the lights of a ship ahead, ported her helm, but did not put it hard a-port in the first instance. The ship which was coming up channel mistook the lights of the steam-vessel for those of a lugger at anchor, and starboarded her helm for the purpose of passing within hail of her, in consequence of which a collision took place. It was held that the steamer, (though the collision would have been avoided had she put helm hard a-port in the first instance,) did all she was called upon to do, having reason to expect that the ship would either have kept her course, or put her helm to port; and that the ship was in culpable error in starboarding instead of porting her helm, as some uncertainty must have existed as to the character of the vessel carrying the lights, and that she was, therefore, liable for the damage occasioned by the collision.[3]

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[1] The Friends, 1 Rob. R. 469; and see Hawkins *v.* The Dutchess and Orange Steamboat Co. 2 Wend. (N. Y.) R. 452.

[2] The Hope, 1 W. Rob. R. 154.

[3] The Sappho, 9 Jur. 560.

§ 662. In Lowry *v.* The Steamboat Portland,[1] the learned District Judge (Davis) took the opinion in writing of some distinguished nautical men under oath, who, among other things, returned this answer: — "In our answers to former questions, we have stated the rule or usage to be, that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack shall give way, and thus each pass to the right. This rule should govern vessels, too, sailing on the wind, and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward, that if both persist in their course, the other will strike her on the leeward side abaft the beam, or near the stem, in such case the vessel on the starboard tack must give way, as she can do so with greater facility, and less of time and distance than the other. These rules are particularly intended to govern vessels approaching each other, under circumstances that prevent their course and movements being readily ascertained with accuracy; for instance, in a dark night or dense fog. At other times, circumstances may render it expedient and proper to depart from them; for we consider them all subordinate to the rule prescribed by common sense, and applicable to all cases, under any circumstances, which is *that every vessel shall keep clear of every other vessel, when she has the power to do so, notwithstanding such other may have taken a course not conformable to established usage.* We can scarcely imagine a case, in which it would be justifiable to persist in a course, after it had become evident that collision would ensue, if by changing such course the collision could be avoided."

§ 663. In an action at Common Law (of the case) brought to recover damages for an injury sustained by the plaintiff in consequence of the running of a steamboat upon a sloop

[1] *Ante*, § 655; Steamboat Co. *v.* Whillden, 4 Harring. (Del.) R. 228.

belonging to the plaintiff, while navigating the river Hudson; it appeared on the trial, that the two vessels met just below the overslaugh below Albany. The sloop was going down the river with a fair but light breeze at the rate of two miles an hour, and the steamboat was going up the river at the rate of six or seven miles an hour. The sloop had just crossed the bar in the usual channel, and necessarily ran near the eastern shore, the steamboat was also close in on the same shore; the officers of both vessels hailed; the plaintiff on board his sloop called to the officers of the steamboat to stop the engine; the pilot of the boat called to the plaintiff, who was at the helm of his sloop, to bear away; the plaintiff did bear away, but, as he had but little headway on his vessel, he made but little progress. The engine of the steamboat was stopped, but *the boat was not backed*, as she might have been, and struck with her bow the waist of the plaintiff's sloop and injured her materially. The verdict being for the plaintiff, it was moved to be set aside, but a new trial was denied, the Court, by Savage, C. J., saying: — "The real question is, whether the officers of the steamboat were not guilty of negligence in refusing or neglecting to exercise the power they possessed, which would have prevented the injury. The boat was perfectly under the control of its officers, the sloop was not; the officers of the boat did not endeavor to avoid the collision, which they might have done, either by backing their boat, or by going on the west side of the sloop, where there was room enough and water enough. The sloop was compelled to go near the east shore, in order to pass the bar with safety; and, after passing the bar, the captain did all in his power in order to avoid the collision, by endeavoring to go west of the boat; but, from the slow motion of his sloop, this was impracticable before the boat struck him. This appears a strong case of negligence, if not of wilful injury." [1]

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[1] Hawkins *v.* The Dutchess and Orange Steamboat Co. 2 Wend. (N. Y.) R. 452.

§ 664. The owner of a vessel, which, through the fault or negligence of any one on board, injures another vessel by running a-foul of her, is liable to the injured party, although there is a *pilot* on board who has the entire control and management of the vessel.[1] It is more convenient, it is held, that the owner of such vessel should seek his remedy against the pilot, whom he has selected for this service, than that the injured party should. It is also, it is held, more conformable to the general spirit of the law; for although the pilot holds his commission under government, yet in many respects he is the servant of the owner who employs him, and in regard to the time of sailing, is undoubtedly under the direction of the owner. The master, in such case, would not be liable, for he is answerable only in respect of his authority over the vessel, which authority is entirely suspended by that of the pilot, when the vessel is under sail, within pilot ground.[2] In

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[1] Yates *v.* Brown, 8 Pick. (Mass.) R. 22; Shaw *v.* Reed, 9 Watts & S. (Penn.) R. 72; Smith *v.* Condry, 1 How. (U. S.) R. 28; Bussy *v.* Donaldson, 4 Dallas, R. 206; Fletcher *v.* Braddick, 5 Bos. & Pull. R. 182. And see *ante*, § 193, note.

[2] Opinion of the Court by Parker, C. J., in Yates *v.* Brown, *ub. sup.* In this case, it appeared on trial, that the Napoleon, when sailing out of the harbor of Boston, bound on a foreign voyage, with a pilot on board, came in contact with the Only Son, which was lying in the stream, by which the bowsprit of the Only Son was injured. One of the defendants was on board the Napoleon when the accident happened. A verdict having been found for the plaintiffs, which settled the amount of damage, and the fact of the mismanagement of the defendant's vessel, the question was reserved for the whole Court, whether there being a person duly authorized to pilot the Napoleon, the owners of the vessel were liable for an injury from negligence or mismanagement in navigating the vessel out of the harbor. The captain of a sloop of war, it has been held, is not liable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there. The master was a captain in the *naval service*, and had no power of appointing the officers or crew on board; and *there is no reason for making one man liable for the*

Snell *v.* Rich, in New York, the vessel which run foul of another vessel lying at anchor, and carried away her bowsprit, was sailing at the time out of the harbor with a pilot on board, and the master at the time was on shore; and Livingston, J., said, — "It is universally understood that the pilot, while on board, has the absolute and exclusive control of the ship; and I am prepared to say, that if the master had been on board, he would not have been responsible."[1] In the case of the ship Massachusetts, in the English High Court of Admiralty,[2] a collision was occasioned by the dragging of her anchor, and, in consequence, driving against the bows of the Bulfinch; the anchor being too light to hold the ship. It was held, that the owners of the damaging ship were not exempted from responsibility by the fact of having a licensed pilot on board, at the time, under the provisions of the statute 6 Geo. 4. Dr. Lushington, in addressing Trinity Masters, said, — "If you are of opinion, that the accident arose partly from the fault of the pilot in not coming to an anchor in sufficient time, and partly from the defective weight of the anchor; the legal consequence is, that the damage having arisen from the joint default of the pilot and the owners, the responsibility of the loss must fall upon the owners of the ship." That is, although, by the aforesaid statute, the owners are exempted from responsibility in case of accidents, when there is a licensed pilot on board, they would not be, even by the force of the statute, if the accident was owing, in any degree, to the fault of the master.[3]

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act of another whom he did not appoint or employ. Nicholson *v.* Mounsey, 15 East, R. 384.

[1] Snell *v.* Rich, 1 Johns. (N. Y.) R. 304.

[2] The Massachusetts, 1 W. Rob. R. 371.

[3] The Girolamo, an Austrian vessel, left the London Docks with a licensed pilot on board, towed by a steam-vessel. After she had passed Blackwall, a fog came on, during which she run foul of the Edward, a British convict ship, moored below Woolwich, in the proper berth for such vessels. Sir John Nicholl said: "Did the accident arise from the *neglect*,

§ 665. When a collision occurs in the port of a foreign country, the rights and responsibilities will depend on the laws of that country as interpreted by its judicial tribunals. By some of the English pilotage statutes, (6 Geo. 4, c. 125,) neither the master nor the owner of a vessel is answerable for damage occasioned entirely by the fault of the pilot;[1] and in case of a collision between two American vessels in an English port, the rights of the parties, it has been held, will depend, in a suit in this country, upon the provisions of these statutes. It was so determined by the Supreme Court of the United States, in Smith *v.* Condry,[2] in which Taney, C. J., in giving the opinion of the Court, says: — "The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes, then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanc-

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default, or *incapacity* (the words of the act 6 Geo. 4,) of the pilot? or was the master *in pari delicto?* It occurred from the vessel going on in the fog, not from the want of bad steerage, want of knowledge of shoals, or any incapacity as pilot, but from proceeding at all. It seems to be nearly admitted, that if the vessel had set off in this fog, blame would have been imputable to the master; if so, was he not blamable in going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners and to other persons, whose property might be damaged by collision, to insist on bringing the vessel up? Was not the master in duty bound at least to remonstrate with the pilot, and to represent the danger of proceeding? Yet he says in his affidavit, 'he did not in the least interfere.' In this aspect, the case is, as far as I am aware, *new*, and one of too much difficulty to arrive at any hasty decision upon, unless there be no other points upon which the case may be disposed of." 3 Hagg. R. 176, and Abbott on Shipp. (5th Am. ed.) 300, n. (*b.*)

[1] Carruthers *v.* Sydebotham, 4 M. & Sel. R. 77.

[2] Smith *v.* Condry, 1 How. (U. S.) R. 28. It appears by the case of the Vernon, that the provisions of 6 Geo. 4, equally apply in cases where the damage is done by a British ship to the property of foreigners, as in cases entirely between British subjects, upon the principle, that when a remedy is sought to be obtained, the party seeking it must take it according to the law of the country in which it is to be enforced. The Vernon, 1 W. Rob. R. 316.

tioned by their own Courts." The leading principle of the legislature, in England, in exonerating owners of vessels from any damage occasioned by their vessels having pilots on board, is, that the masters are compellable to take such pilots on board, and the owners are not responsible for the acts of persons to whom they are thus forced to commit the management of their property, and over whom they have no control.[1] It may be inferred, says Lord Tenterden, from two cases considered together, which were cited with respect to a Liverpool pilot — one in the Court of King's Bench,[2] and the other in the Court of Exchequer[3] — that where the master is bound by an act of Parliament, under a penalty, to place his ship in charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners, or their servants; but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as a servant of the owners. Under what circumstances the master is thus bound to place his vessel under the charge of a local pilot, must depend upon the provisions of the local law, by which the duty of taking a pilot is imposed by the master. The master is not answerable for the misconduct or awkwardness of a person whose appointment is, by public authority, taken out of his hands.[4] The appointment of pilots, and the regulation of pilotage, have been hitherto left by the Congress of the United States to the State Legisla-

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[1] The Maria, 1 W. Rob. R. 95; and see cases cited *ante*, § 193, n. 3. See the different acts of Parliament on the subject of pilots and pilotage compared and commented on by Mr. C. J. Taney, in Smith *v.* Condry, *ub. sup.* The Protector, 1 W. Rob. R. 45. That the construction of the different pilot acts in England, has not been uniform. The Agricola, 2 W. Rob. R. 10; Mackintosh *v.* Slade, 6 B. & Cress. R. 657.

[2] Carruthers *v.* Sydebotham, 4 M. & Sel. R. 77.

[3] Attorney-General *v.* Case, 3 Price, R. 302.

[4] Abbott on Shipp. (5th Am. ed.) 278. See the case of the Fama, 2 W. Rob. R. 84.

tures; and the act of Congress, of 1789, ch. 10, expressly recognizes and confirms the regulations made on this subject by the State Legislatures.[1]

§ 666. In Reeves *v.* The Ship Constitution, in the District Court of the United States, for the Eastern District of Pennsylvania, the libellants claimed compensation under the following circumstances: The steamboat William Wray, belonging to the libellants, was employed in *towing* the ship Constitution, to which she was fastened, up the river Delaware. There was a licensed pilot on board the ship, under whose directions both vessels were steered. In the course of the passage, they came in contact with a schooner, sailing on the river, by reason of which the steamboat sustained considerable injury. The libel was dismissed with costs, Judge Hopkinson holding, that where a steamboat is hired for the purpose of towing a vessel to which she is fastened, and both are under the direction of a licensed pilot, the owner of the steamboat is not entitled to damages on account of injury sustained in the course of the navigation, and not caused by undue negligence of the pilot.[2]

§ 667. It was contended in Sproul *v.* Hemmingway, in

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[1] For cases arising under the State pilot laws, see the extensive note to p. 176, of 6th Ed. of Kent's Comm. It is the duty of the master engaged in the foreign trade, says Kent, to put his ship under the charge of a pilot both on his outward and homeward voyage, when he is within the usual limits of the pilot's employment. The pilot, while on board, has the exclusive control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel while under the charge of the pilot, he is answerable, as strictly as if he were a common carrier, for his default, negligence, or unskilfulness; and the owner would also be responsible for the injured party for the act of the pilot, as being the act of his agent. 3 Kent, Comm. (5th ed.) 176. And see *ante*, § 193, note.

[2] Reeves *v.* The Constitution, Gilp. (D. C.) R. 579.

Massachusetts,[1] that the principle which holds the owner of a vessel liable for the acts of the pilot who may have charge of her, would render the owner of a vessel liable for the negligence of the master of a steamboat who has such vessel in charge in the employment of *towing* her. A schooner called the Triton, it appeared in that case, was lying at anchor in the river Mississippi, a few miles below New Orleans, when a steamboat called the Grampus came down, having a ship lashed on each side, and a brig called the Burton towed astern by a hawser of about thirty fathoms in length; the steamboat, when thus employed, passed so near the schooner that the ship on her larboard side just cleared the schooner, and a collision between the brig and the schooner took place; for which an action on the case was brought by the owners of the schooner against the owner of the brig. The evidence tended to show, that, in consequence of the bad management of those who had charge of the steamboat, the brig in tow, without any culpable negligence of those who had charge of her, was thrown out of the track of the steamboat, and so caused the collision. In reference to which the jury were instructed, that if the collision took place through the negligence, unskilfulness, or misconduct of those who had charge of the steamboat, the owner of the brig was not liable; to which instruction the plaintiffs excepted, the jury having found a verdict for the defendant. The question which was raised, the Court considered, was, whether the master and crew of the steamboat could be legally considered as the servants of the defendant. The Court acknowledged the difficulty of determining what facts and circumstances, in legal contemplation, go to establish the relation of superior and subordinate, or of employer and employee, in such a manner as to give effect and application to the rule. As the case of a vessel towed by a steamboat was new, and could not have been anticipated by the founders of the Common

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[1] Sproul *v.* Hemmingway, 14 Pick. (Mass.) R. 1.

Law, the Court, in deciding the question, applied what they considered to be established principles and analogous cases; and had recourse to the authorities as reviewed in Steinman *v.* Bush,[1] and Laugher *v.* Pointer.[2] Tried by these principles and authorities, it was held, the defendant was not responsible for damages, attributable to the default of the master and crew of the towing steamboat. "They were not," said Mr. C. J. Shaw, "the servants of the defendants; were not appointed by him; did not receive their wages or salaries from him; the defendant had no power to remove them; had no power to order or control them in their movements; had no contract with them, but only through them, with the owners of the steamboat, for a participation in the power derived from the public use and employment of that vessel, by her owners. After making such a contract, it was perfectly in the power of the owners of the steamboat to appoint another master, pilot, and crew, and the defendant would have had no cause of complaint."[3]

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[1] Steinman *v.* Rush, 1 Bos. & Pull. R. 404.

[2] Laugher *v.* Pointer, 5 B. & Cress. R. 547, and *ante*, § 575.

[3] "Nor," said the learned Judge, (for, on account of the importance of the question, and the probability of its often arising, we give the rest of his able opinion,) "can the master and crew of the steamboat, in any intelligible sense, be considered as in the employment or business of the defendant, any more than a general freighting ship, her officers and crew, can be considered as in the employment of each freighter of goods, or the master and crew of a ferryboat, in the employment of the owners of each coach, wagon, or team transported thereon. The steamboat was engaged in an open, public, distinct branch of navigation, that of towing and transporting vessels up and down the Mississippi, for a certain toll or hire, for the profit of the owners. The defendant seemed to have the same relation to the steamboat, that a freighter has to a general ship, or a passenger to a packet. The defendant participated in the benefit but incidentally and collaterally; he did not share in the profits of the business, one which, from its magnitude, may well be called the trade of towing. Such a trade may be considered as much a public and distinct employment, as that of freighting or conveying passengers. The steamboat was in no sense in the possession of those whom she was employed to tow. If it is contended, that the defendant is liable on the ground, that the steamboat was, for the time

§ 668. But although the owners of the steamboat in the above case, were not liable for their negligence to the owner of the schooner, they would have been liable for their negligence to the owners of the vessels they had in tow for any

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being, in his possession, occupation, or employment, then it would follow that the defendant would be liable for the negligence of the officers and crew of the steamboat, as well whether the plaintiff's vessel was struck by the defendant's vessel, the Burton, as struck by either of the other vessels towed, or by the steamboat herself; which cannot for a moment be contended. The case may well be illustrated by considering the condition of one of the side vessels, firmly lashed to the steamboat, and governed wholly by its movements. The payment for the privilege of being thus moved or transported, is precisely like freight paid, for heavy luggage, timber or spars, for instance, carried in or upon a ship. The whole conduct and management is entirely under the control of the master and crew of the towing vessel in the one case, as it is of the freighting ship, in the other. If collision takes place between the side ship, thus firmly lashed, and another vessel, it is as directly attributable to the steamboat, and her officers and crew, as if the steamboat herself had come into collision with the other vessel. The towed ship is the passive instrument and means by which the damage is done. But there is no difference, in this respect, between the condition of one of the side ships, and a ship towed astern, except this, that on board the ship towed astern by means of a cable, something may and ought to be done by the master and crew, in steering, keeping watch, observing and obeying orders and signs ; and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist ; the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it. The jury were so instructed at the trial, and it was left to them to find, whether the damage was caused by the negligence of the one or the other. Then, supposing all duties faithfully performed on board the towed vessel, and the damage to be caused by the negligence or misconduct of the master and crew of the steamboat, there is no difference between the case of the side ship, which is wholly passive, and the ship astern, which is partially so. The case most nearly resembling this, perhaps, is that of a vessel chartered, where for a certain time the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed and the crew engaged and subsisted by the owners ; in which case it is held, that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew. Fletcher *v.* Braddick, 5 Bos. & Pul. R. 182."

injury occasioned to them in consequence of it. The owners of steamboats, when employed in their ordinary business of transporting goods, are liable to the full extent of common carriers;[1] but whenever they are employed out of the course of such their ordinary business, as in the instance of *towing* a freight vessel, the owners are held to no more than *ordinary* careful management, and the law of common carriers is not applicable to them.[2] In one case it was held, that the owners of a steamboat who undertook, for hire, to tow a canal boat and her cargo on the river Hudson, were absolved from the obligation of the exercise of even ordinary care, by a stipulation that the canal boat was to be towed at the risk of her master; but that they were still liable for negligence so *gross*, as to be confounded with fraud.[3] If no negligence can be proved on the part of a steamer for damage occasioned in such cases, the owners of course are not responsible either to the vessel in tow, or to the owners of a vessel injured by her coming in contact with the vessel in tow.[4]

§ 669. Loss by collision of vessels, it must be perceived,

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[1] *Ante*, § 83.

[2] Caton *v.* Barney, 13 Wend. (N. Y.) R. 387; Pennsylvania, Del. and Md. Navigation Co. *v.* Dandridge, 8 G. & Johns. (Md.) R. 109; and *ante*, § 86. Even an express promise to tow *safely*, is but an undertaking to tow with ordinary care, and does not create the obligation of a common carrier. *Ante*, § 60.

[3] Alexander *v.* Greene, 3 Hill, (N. Y.) R. 1. But in a case in the District Court of the United States for the Eastern District of Pennsylvania, Kane, J. stated considerations for holding a steam-tug to the rigid accountability of a common carrier, in opposition to the case of Alexander *v.* Hill. A captain of a steam-tug is the pilot of the voyage, and is the best judge of the sufficiency of the canal boat taken in tow, to resist the weather, and of the adequacy of her crew to do what may be required for her protection, and cannot limit his responsibility by a notice given at the time of commencing the voyage, that it must be at the risk of the owner of the canal boat. The steam-tug, notwithstanding such notice, is bound for the exercise of all that skill and care which the circumstances of the case demand. Vanderslice *v.* Steam Tow-boat Superior, Law Rep. for December, 1850, p. 399.

[4] The Duke of Sussex, 1 W. Rob. R. 270.

has been a difficult subject for discussion and decision, and the evidence as to the real cause of collision is of difficult access. The accident usually happens in the darkness of the night, or in a fog, or in a storm, and is necessarily accompanied with confusion and agitation.[1] Where the evidence on both sides is conflicting and nicely balanced, Courts of Admiralty are guided by the probabilities of the respective cases which are set up; but the law requires that there should be *preponderating* evidence to fix the loss on the party charged, before the Court can adjudge him to make compensation.[2] *A priori*, the presumption, as we have already said, is, that the master of a vessel would do what was right, and follow the correct and regular course of the navigation.[3]

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[1] 3 Kent, Comm. 230. Miscellaneous cases relating to collision: The Freya, 5 C. Rob. R. 75; The Thames, Ibid. 345; The Agricola, 2 W. Rob. R. 10; The Blenheim, 10 Jur. 79; Seccombe *v.* Wood, 2 Mood. & Rob. R. 290. Of the effect of a verdict in an action at Law on a suit in the Court of Admiralty, with respect to the same collision: The Ann & Mary, 2 W. Rob. R. 189; General Steam Nav. Co. *v.* Tonkin, (The Friends,) 4 Moore, R. 321. Costs in causes of collision: The Washington, 5 Jur. 1067; The Itinerant, 2 W. Rob. R. 244.

[2] The Ligo, 2 Hagg. R. 356.

[3] The Mary Stewart, 2 W. Rob. R. 244; The Alexander Wise, Ib. 65. Where it is shown that the vessel charged as the wrongdoer omitted an ordinary and proper measure of prevention, the burthen is on her to show, that the collision was not owing to her neglect, but would have happened, nevertheless, if the precaution had been taken. Thus, where the respondents' vessel was intentionally left at her moorings in a harbor, to encounter an approaching gale, *without any person on board*, and during the night she dragged her anchors, and run foul of the libellant's vessel, it was held to be incumbent on the respondents to show that the misfortune was not attributable to this cause. Clapp *v.* Young, Dist. Co. in Massachusetts, February, 1848, (Law Rep. 111,) and cited in Conkl. Adm. Juris. and Pract. 303. A like principle has been asserted by the Supreme Court of the United States, with respect to the non-observance of the precautions against collision enjoined by the act of Congress of July 7, 1838, ch. 191, (and see Appx. p. lxxxiv.) and the amendatory of March 3, 1843, ch. 94, (and see Appx. p. lxxxviii.) The 10th section of the former act requires the master and owners of every steamboat running between sunrise and sunset,

§ 670. The testimony of the persons on board the respective vessels is admitted *ex necessitate rei*, which rule is considered one of the exceptions to the general rules of evidence adopted in Courts of Admiralty, excluding the testimony of a witness directly interested in the event of the suit. Upon this ground, the crew of the vessel charged with committing the damage, were admitted as witnesses in the case of The Catherine of Dover,[1] though, being sharers in the profits and loss of the vessel, they would not swear they were disinterested in the result. This exception to the general rule of the law of evidence gave occasion to Sir William Scott, afterwards Lord Stowell, to say, — that "the testimony of witnesses is apt to be discolored by their feelings, and the interest which they take in the success of the cause; and the Court too frequently has to decide upon great diversities of statement as to the courses the vessels were steering, or the quarter from which the wind was blowing at the time when the accident occurred."[2]

§ 670 *a*. With respect to damages to be awarded and apportioned in cases of collision, the jury, we have seen, when an action at law is brought, may take an equitable view of the facts and circumstances,[3] and such is clearly the principle by which Courts of Admiralty are guided.[4] A wilful collision will justify exemplary damages; but when it is the consequence of the want of due care, or of ignorance, the damages are merely compensatory.[5] The case of Smith

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to carry one or more signal lights. In a case before the Court, which was that of a collision between two steamboats on the Mississippi River, the respondents' vessel had omitted this precaution, and the Court held, that this alone was sufficient to cast the burthen of proof to show that the injury done by their steamer was not the consequence of the omission. Waring *v.* Clark, 5 How. (U. S.) R. 441.

[1] The Catherine of Dover, 2 Hagg. R. 145.

[2] The Woodrop Sims, 2 Dod. R. 83.

[3] *Ante*, § 639, 640.

[4] *Ante*, § 641, 642.

[5] Steamboat Co. *v.* Whillden, 4 Harring. (Del.) R. 228; Cummings *v.* Spruance, Ibid. 315.

v. Cowdry, in the Supreme Court of the United States,[1] decides the important principle, that the actual damage sustained at the time and place of the injury, and not the profits which probably might have been realized if the collision had not occurred, constitutes the just measure of damages to be awarded to the injured party.

§ 671. We conclude the perplexed subject of liability for damage occasioned by collision of vessels, by warning ship owners, that it is important for them to bear in mind, that in case of collision, they will not be absolved from the duty of rendering every assistance in their power to the ship which has been in error, for the safety of her cargo and her passengers. It is held, indeed, in the Admiralty, to be a suspicious circumstance when effort has not been made to help the damaged vessel; and the owners of the Celt, though not otherwise in fault, were condemned in all costs and expenses of the suit, because the master made no attempt to save the ship run down.[2]

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[1] Smith *v.* Cowdry, 1 How. (U. S.) R. 28. That the probable profits of the voyage are not the fit mode of ascertaining the damages, in cases of marine torts, The La Armistead de Ruess, 5 Wheat. (U. S.) R. 385. The statute of 53 Geo. 3, c. 159, was passed to limit the responsibility of ship owners in case of loss or damage from collision or other accident; the word "ship" occurs throughout the statute; in section 1, it is alone; in the following sections, the expression "value of the ship and her appurtenances," occurs not less than ten times. In a case of collision the Dundee was at the time sailing on a voyage to the Greenland fishery, having on board the necessary stores and implements for the taking of whales and other fish, and procuring and bringing home in casks the oil and blubber, a question arose whether section 1 of the statute was to be construed as if the words "with all appurtenances" had been inserted in that clause; and it was held that it should be so construed, and that whatever was on board of the ship for the object of the voyage and adventure on which she was engaged, belonging to the owner, constituted a part of the ship and her appurtenances within the meaning of that statute, and that the owner was liable to the extent of the value thereof for damage done to another vessel in the manner described by the act. Gale *v.* Laurie, 5 B. & Cress. R. 156.

[2] The Celt, 3 Hagg. R. 321.

APPENDIX.

APPENDIX.

SELECT ADJUDGED CASES.

COGGS *v.* BERNARD, (2 Ld. Raym. R. 909.)

[2 *Annæ Reginæ.*]

IN an action upon the case, the plaintiff declared, *quod cum*, Bernard, the defendant, the 10th of November, 13 Will. III., at, &c., *assumpsisset*, *salvo et secure elevare*, *Anglice*, to take up several hogsheads of brandy, then in a certain cellar in *D. et salvo et secure deponere*, *Anglice*, to lay them down again, in a certain other cellar in Water lane, the said defendant and his servants and agents, *tam negligenter et improvide*, put them down again into the said other cellar, *quod per defectum curæ ipsius*, the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz. so many gallons of brandy was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole Court.

Gould, Justice. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage; and if a premium be laid to be given, then it is without question so. The reason of the action is, the

particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without any thing to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum.* So is the 3 Hen. VI. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doct. & Stud. 129, upon that difference. The same difference is where he comes to goods by finding. Doct. & Stud. *ubi supra*, Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable without a gross neglect. So is Keilw. 160; 2 Hen. VII. 11; 22 Ass. 41; 1 R. 10; Bro. *action sur le case*, 78. Southcote's case is a hard case indeed, to oblige all men that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of; and indeed it appears by the report of that case in Cro. El. 815, that it was adjudged by two Judges only, viz. Gawdy and Clench. But in 1 Ventr. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for £30, the defendant showed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

Powys agreed upon the neglect.

Powell. The doubt is, because it is not mentioned in the declaration, that the defendant had any thing for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend, when there is not any particular neglect shown? And I hold, an action will lie, as this case is. And in order to make it out, I shall first

show, that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider Southcote's case.

1. Those authorities in the Register, 110, *a*, *b*, of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them, but that they are writs, which are framed short. But a writ upon the case must mention every thing that is material in the case, and nothing is to be added to it in the count, but the time, and such other circumstances. But even that objection is answered by Rast, Entr. 13, *c*, where there is a declaration so general. The year books are full in this point. 43 Ed. III. 33, *a*, there is no particular act showed. There indeed the weight is laid more upon the neglect than the contract. But in 48 Ed. III. 6, and 19 Hen. VI. 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 Hen. VII. 11, 7 Hen. IV. 14, these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now, to give the reason of these cases, the gist of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is 1 Jones, 179, Palm. 548. For the bailee is not bound, upon any undertaking against the act of God. Justice Jones, in that case, puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case, for the action there is founded upon the ferryman's act, viz. the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrongdoers; as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable.

But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore, when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that, in consideration, the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally.

3. Southcote's case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think, that a general bailment is an undertaking to keep the goods safely, at all events. That is hard. Coke reports the case upon that reason, but makes a difference, where a man undertakes specially to keep goods as he will keep his own. Let us consider the reason of the case; for nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Ed. IV. 40, *b*, there is such an opinion by Danby. The case in 3 Hen. VII. 4, was of a special bailment, so that that case cannot go very far in the matter. 6 Hen. VII. 12, there is such an opinion by the by. And this is all the foundation of Southcote's case. But there are cases there cited, which are stronger against it, as 10 Hen. VII. 26; 29 Ass. 28, the case of a pawn. My Lord Coke would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep.

8 Ed. II. Fitzh. *detinue*, 59, the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard, that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or, however it may be with them, half mankind never heard of it. So, for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt, Chief Justice. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that, for want of care in him, some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful, are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is, when goods are

left with the bailee to be used by him for hire ; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor ; and this is called in Latin *vadium*, and in English a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially excepted, to keep them only as you will keep your own. But my Lord Coke has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded ; and therefore it is incumbent upon them, that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a his-

tory of the authorities in the books in this matter, and by them show that there never was any such resolution given before Southcote's case. The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. II. Fitz. *detinue*, 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. IV. 40, *b*, was but a debate at bar. For Danby was but a counsel then, though he had been Chief Justice in the beginning of Edw. IV., yet he was removed, and restored again upon the restitution of Hen. VI., as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genny for his client said the contrary. The case in 3 Hen. VII. 4, is but a sudden opinion, and that but by half the Court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence, to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is Bracton, *lib.* 3,

c. 2, 99, *b. J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiæ, quia qui negligenti amico rem custodiendam tradit, sibi, ipsi et propriæ fatuitati hoc debet imputare.* As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for there it is said, *Ex eo solo tenetur, si quid dolo commiserit; culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suæ facilitati id imputare debet.* So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrongdoers. 3 Cro. 214, *acc.* 2 Cro. 425, *acc.* upon a promise for quiet enjoyment. And if a promise will not charge a man against wrongdoers, when put in writing, it is hard it should do it more so, when spoken. Doct. & Stud. 130, is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrongdoer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz. *commodatum* or lending *gratis*, the borrower is bound to the strictest care and diligence, to keep the

goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable ; as if a man should lend another a horse, to go westward, or for a month ; if the bailee go northward, or keep the horse above a month ; if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable ; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton *ubi supra :* his words are, *Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuam et commodatum ; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire ; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio amiserit non est dubiumquin ad rei restitutionem teneatur.* I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable ; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, *b. Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur*

custodia; qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est. From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz. *vadium*, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c., but if it be such, as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompense for the meat. As to the second point, Bracton, 99, *b*, gives you the answer. *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tute sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impeditur creditum petere.* In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and

he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawner for his debt. Agreeable to this is 29 Ass. 28, and Southcote's case is. But indeed the reason given in Southcote's case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed if the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged 26 Car. II., in the case of Mors *v.* Slew, Raym. 220; 1 Vent. 190, 238. The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors,

and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy: in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called *mandatum*. It is an obligation, which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his Commentaries upon Justinian, lib. 3, tit. 27, 684, defines *mandatum* to be *contractus quo aliquid gratuto gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, *contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei: ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis*. I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in the case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action; 1 Roll. Abr. 10, 2 Hen. VIII. 11, a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. VI. 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. IV. 33, this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the Court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A, and in consideration thereof he promise to

re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said by the Judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21 Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of Mors *v.* Slew was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

HOLLISTER *v.* NOWLEN.

Supreme Court of the State of New York, May, 1838, (19 Wend. R. 234.)

Stage-coach proprietors and other common carriers cannot restrict their Common Law liability by a general notice, that the "BAGGAGE OF PASSENGERS IS AT THE RISK OF THE OWNERS."

THIS was an action against the defendant as a *common carrier* for the loss of the plaintiff's trunk and contents. A case was agreed on between the parties, stating the following facts: The defendant was a member of a company, the proprietors of three daily lines of stage-coaches running between Canandaigua and Buffalo, one of which was called the Telegraph line. The defendant resided at Avon, and with his teams and coaches ran that part of the route lying between Avon and Le Roy. East of Canandaigua the line was owned by *other* proprietors. The plaintiff resided at Utica, and at that place entered as a passenger in the Telegraph line for Buffalo. His baggage consisted of a trunk, containing clothing to the value of $116.75. The fare was duly paid. On the 20th July, 1833, before daylight in the morning, the plaintiff left Avon in the defendant's coach on his way to Buffalo. The trunk was placed in the boot behind the coach, which was carefully secured by strong leather covering, fastened with strong leather straps, and buckles, and was made secure against any loss except by violence. After proceeding about three miles it was discovered that the straps confining the cover of the boot had been cut and the plaintiff's trunk with its contents had been feloniously stolen and carried off. There was no negligence on the part of the defendant or his servants in relation to the trunk, further than may be implied from the facts above stated. The plaintiff left the stage, went back to Avon and reported his loss; and the defendant offered a reward, and made all proper efforts for the recovery of the property, but without success.

The Telegraph line was established in 1828. A public notice, *that baggage sent or carried in the Telegraph line, would be at the risk of the owner thereof*, printed on a large sheet, had been uni-

formly kept placarded in most of the stage offices and public houses from Albany to Buffalo; and particularly such notice had been continually affixed up in the stage-office and principal public houses at Utica, where the plaintiff had resided for the last three years before the trunk was lost. It was stipulated that should the Court be of opinion that the plaintiff was entitled to recover, judgment should be entered in his favor for $116.75, and interest from July 20, 1833, besides costs.

This cause was twice argued; the first time in July term, 1835, by C. P. Kirkland, for the plaintiff, and by M. T. Reynolds, for the defendant; and the second time in July term, 1837, by C. P. Kirkland, for the plaintiff, and by P. Gridley for the defendant. At this term the following opinion was delivered:

By the Court, Bronson, J. Stage-coach proprietors, and other *carriers* by land and water, incur a very different responsibility in relation to the *passenger* and his *baggage*. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies. As the point, though made, was not discussed by the defendant's counsel, I shall content myself with referring to a few cases to prove that they are liable as common carriers, for the loss or injury of the property of the passenger. Orange Co. Bank *v.* Brown, 9 Wend. R. 85; Camden Company *v.* Burke, 13 Id. 611; Brooke *v.* Pickwick, 4 Bing. 218; 4 Esp. R. 177; 2 Kent, 601. The fact that the owner is present, or sends his servant to look after the property, does not alter the case. Robinson *v.* Dunmore, 2 Bos. & Pull. 418. Chambre, J. said, "It has been determined, that if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." The liability of a carrier is like that of an innkeeper; and it was said in Calye's case, 8 Co. 63, that "it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left the door open; but he ought to keep the goods and chattels of his guest there in safety." When there is no fraud, the fact that the owner accompanies the property

cannot affect the principle on which the carrier is charged in case of loss.

The principal question in the cause arises out of the notice given by the coach proprietors, *that baggage carried by the Telegraph line would be at the risk of the owner;* and the first inquiry is, whether there was sufficient evidence to charge the plaintiff with a knowledge of the notice. If we are to follow the current of modern English decisions on this subject, it cannot be denied that there was evidence to be left to a jury, and upon which they might find that the plaintiff had seen the notice. But I think the carrier, if he can by any means restrict his liability, can only do so by proving *actual notice* to the owner of the property. I agree to the rule laid down by Best, C. J., in Brooke *v.* Pickwick, 4 Bing. 218, decided in 1827, when the Courts of Westminster Hall had commenced retracing their steps in relation to the liability of carriers, and were endeavoring to get back on to the firm foundation of the Common Law. He said: — "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper, specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the Common Law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them."

I should be content to place my opinion upon the single ground, that if a notice can be of any avail, it must be directly brought home to the owner of the property; and that there was no evidence in this case which could properly be submitted to a jury to draw the inference, that the plaintiff knew on what terms the coach proprietor intended to transact his business. But other questions have been discussed; and there is another case before the Court,[1] where the Judge at the Circuit thought the evidence sufficient to charge the plaintiff with notice. It will, therefore, be proper to consider the other questions which have been made by the counsel.

Can a common carrier restrict his liability by a general notice,

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[1] The case of Cole *v.* Goodwin and Story, *post.*

in any form, brought home to the opposite party? Without intending to go much at large into this vexed question, it will be necessary to state some leading principles relating to the duties and liabilities of the carrier, and the ground upon which his responsibility rests.

The rules of the Common Law in relation to common carriers, are simple, well defined, and what is no less important, well understood. The carrier is liable for all losses, except those occasioned by the act of God or the public enemies. He is regarded as an insurer of the property committed to his charge, and neither destruction by fire, nor robbery by armed men, will discharge him from liability. Holt, C. J., in pronouncing his celebrated judgment in the case of Coggs *v.* Bernard, 2 Ld. Raym. 918, said: "This is a political establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing." In Forward *v.* Pittard, 1 T. R. 27, where the carrier was held liable for a loss by fire, Lord Mansfield says, that "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings and tempests." And in relation to a loss by robbery, he said, "the true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." The rule has been fully recognized in this State. Colt *v.* McMechen, 6 Johns. R. 160; Elliot *v.* Rossell, 10 Johns. R. 1; Kemp *v.* Coughtry, 11 Johns. R. 107. In Robberts *v.* Turner, 12 Johns. R. 232, Spencer, J. said, the carrier "is held responsible as an insurer of the goods, to prevent combinations, chicanery and fraud."

A common carrier exercises a public employment, and consequently has public duties to perform. He cannot, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive a passenger or carry goods according to the course of his particular employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his services and the hazard which he incurs. 2 Ld.

Raym. 917; Bac. Abr. *Carriers*, (B.); Skin. 279; 1 Salk. 249, 250; 5 Bing. 217; 3 Taunt. 272, per Lawrence, J.; 2 Kent, 599; Story on Bailm. 328; Jeremy on Carriers, 59.

It has been said, that the carrier is liable in respect of his reward. Lane *v.* Cotton, 1 Salk. 143. Lord Coke says, "he hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him." Co. Litt. 89, *a*. The carrier may no doubt demand a reward proportioned to the services he renders and the risk he incurs; and having taken it, he is treated as an insurer, and bound to the safe delivery of the property. But the extent of his liability does not depend on the terms of his contract; it is declared by law. His undertaking, when reduced to form, does not differ from that of any other person who may agree to carry goods from one place to another; and yet, one who does not usually exercise this public employment, will incur no responsibility beyond that of an ordinary bailee for hire; he is not answerable for a loss by any means against which he could not have guarded by ordinary diligence. It is not the form of the contract, but the policy of the law, which determines the extent of the carrier's liability. In Ansell *v.* Waterhouse, 2 Chit. R. 1, which was an action on the case against the proprietor of a stage-coach for an injury to the plaintiff's wife, Holroyd, J. said, "this action is founded on what is quite *collateral to the contract*, if any; and *the terms* of the contract, unless changing the duty of a common carrier, are in this case quiet *immaterial*. The declaration states an obligation *imposed upon him by the law*. This is an action against a person, who, by ancient law, held, as it were, a *public office*, and was bound to the public. This action is founded on the general obligation of the law." In Forward *v.* Pittard, 1 T. R. 27, Lord Mansfield said, "It appears from all the cases for a hundred years back, that there are events for which the carrier is liable, *independent of his contract*. By the nature of his contract, he is liable for all due care and diligence; and for any negligence, he is suable on his contract. But there is a *further* degree of responsibility by the custom of the realm, that is, *by the Common Law;* a carrier is in the nature of an *insurer*." See also Hide *v.* Proprietors, &c., 1 Esp. R. 36.

The law in relation to carriers has, in some instances, operated with severity, and they have been charged with losses against which

no degree of diligence could guard. But cases of this description are comparatively of rare occurrence; and the reason why they are included in the rule of the Common Law, is not because it is fit in itself that any man should answer without a fault, but because there are no means of effectually guarding the public against imposition and fraud, without making the rule so broad, that it will sometimes operate harshly. It was well remarked by Best, C. J. in Riley *v.* Horne, 5 Bing. 217, that "when goods are delivered to the carrier, they are usually no longer under the eye of the owner: he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." These remarks lose little of their force when applied to the case of passengers in stages, steamboats, and railroad cars. For although they are in the neighborhood of their property, it is neither under their eye, nor have they any efficient means of protecting it against the consequences of negligence and fraud. The traveller is usually among strangers; his property is in the hands of men who are sometimes selected with little regard to their diligence and fidelity; and if the remedy of the owner, in case of loss, depend on the question of actual negligence or fraud, he must make out his right to recover by calling the very men whose recklessness or frailty has occasioned the injury. It was remarked by Best, C. J. in Brooke *v.* Pickwick, 4 Bing. 218, that "though coach proprietors of the present day are a respectable and opulent class, many of the persons employed by them resemble those whom the Common Law meant to guard against."

There is less of hardship in the case of the carrier, than has sometimes been supposed; for while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the Courts were now at liberty to make instead of declaring the law, it may well

be questioned whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact, that in Great Britain, after the Courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and in all its most important features restored the salutary rule of the Common Law.

The doctrine, that a carrier might limit his responsibility by a general notice brought home to the employer, prevailed in England for only a short period. In Smith *v.* Horne, 8 Taunt. 144, Burrough, J. said, "the doctrine of notice was never know until the case of Forward *v.* Pittard, 1 T. R. 27, which I argued many years ago." That case was decided in 1785, and it is remarkable that it does not contain one word on the subject of notice. If that question was in any form before the Court, it is not mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was first recognized in Westminster Hall in 1804, when the case of Nicholson *v.* Willan, 5 East, 507, was decided. Lord Ellenborough said, the practice of making a "special acceptance" had prevailed for a long time, and that there was "no case to be met with in the books, in which the right of a carrier thus to limit by *special contract* his own responsibility, has ever been by express decision denied." Whatever may be the rule where there is *in fact* a special contract, the learned Judge could not have intended to say, that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice; for he refers to no case in support of the position, and would have searched in vain to find one. Only eleven years before (in 1793) Lord Kenyon had expressly laid down a different rule in Hide *v.* Proprietors, &c., 1 Esp. R. 36. He said, "there is a difference where a man is chargeable *by law* generally, and where on his *contract*. Where a man is bound to any duty and chargeable to a certain extent *by the operation of law*, in such case he cannot, *by any act of his own*, discharge himself." And he put the case of common carriers, and said, they cannot discharge themselves "by any act of their own, *as by giving notice*, for example, to that effect." This case

was afterwards before the King's Bench, but on another point. 1 T. R. 389.

The doctrine in question was not received in Westminster Hall without much doubt; and although it ultimately obtained something like a firm footing, many of the English Judges have expressed their regret that it was ever sanctioned by the Courts. Departing as it did from the simplicity and certainty of the Common Law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled, that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the Courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment; and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer, whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then, whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read; these and many other questions were debated in the Courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law. See 1 Bell's Com. 474. After years of litigation, parliament interfered in 1830, and relieved both the Courts and the public, by substantially re-asserting the rule of the Common Law. Stat. 1 Wm. IV. c. 68.

Without going into a particular examination of the English cases, it is sufficient to say, that the question has generally been presented, on a notice by the carrier that he would not be responsible for any loss beyond a certain sum, unless the goods were specially entered

and paid for; and the decisions have for the most part only gone far enough to say, that if the owner do not comply with the notice by stating the true value of the goods and having them properly entered, the carrier will be discharged. In these cases, the carrier had not attempted to exclude all responsibility. But there are two *nisi prius* decisions, which allow the carrier to cast off all liability whatever. In Maving *v.* Todd, 1 Stark. R. 72, the defendant had given notice that he would not answer for a loss by fire, and such a loss having occurred, Lord Ellenborough thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In Lesson *v.* Holt, 1 Stark. R. 186, tried in 1816, he made a like decision; though he very justly remarked, that "if this action had been brought twenty years ago, the defendant would have been liable; since *by the Common Law* a carrier is liable in all cases except two." We have here, what will be found in many of the cases, a very distinct admission that the Courts had departed from the law of the land, and allowed, what Jeremy's Treatise on Carriers, pp. 35, 36, very properly terms "recent innovations."

Some of the cases which have arisen under a general notice have proceeded on the ground of fraud, Baston *v.* Donovan, 4 B. & Ald. 21; others on the notion of a special acceptance or special contract, Nicholson *v.* Willan, 5 East, 507; Harris *v.* Packwood, 3 Taunt. 271; while in some instances it is difficult to say what general principle the Court intended to establish.

So far as the cases have proceeded on the ground of fraud, and can properly be referred to that head, they rest on a solid foundation; for the Common Law abhors fraud, and will not fail to overthrow it in all the forms, whether new or old, in which it may be manifested. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner gave an answer which is false in a material point, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct. The case of Kenrig *v.* Eggleston, Aleyn, 93, was decided in 1649. The plaintiff delivered a box to the porter of the carrier, saying, "there was a book and tobacco in the box," when in truth it contained £100 in money, besides. Roll, J., thought the carrier

was nevertheless liable for a loss by robbery; "but in respect of the intended *cheat* to the carrier, he told the jury they might consider him in damages." The jury, however, found the whole sum (abating the carriage) for the plaintiff, *quod durum videbatur circumstantibus.*" In Gibbon *v.* Paynton, 4 Burr. 2298, Lord Mansfield said, this was a case of *fraud*, and he "should nave agreed in opinion with the *circumstantibus.*" In Tyly *v.* Morrice, Carth. 485, two bags of money sealed up were delivered to the carrier, saying they contained £200, and he gave a receipt for the money. In truth the bags contained £450, and the carrier having been robbed, paid the £200; and in this action brought to recover the balance, the Chief Justice told the jury, that "since the plaintiffs had taken this course to defraud the carrier of his reward, they should find for the defendant." And the same point was decided in another action against the same carrier. In Gibbon *v.* Paynton, 4 Burr. 2298, £100 in money was hid in an old nail bag, which fact the plaintiff concealed from the carrier; and the money having been stolen, the Court held that this fraud would discharge the defendant. In the case of the Orange Co. Bank *v.* Brown, 9 Wendell, 85, the agent of the plaintiffs put $11,000 in bank bills in his trunk, and delivered it to the captain of the steamboat as his *baggage.* The Court held that the term baggage would only include money for the expenses of travelling, and not a large sum, as in this case, taken for the mere purpose of transportation; and it was said that the conduct of the plaintiff's agent was a virtual concealment as to the money, that "his representation of his trunk and the contents as baggage was not a fair one, and was calculated to deceive the captain." The owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly. Phillips *v.* Earle, 8 Pick. 182.

Fraud cannot, I think, be imputed to the owner from the mere fact, that he delivers goods after having seen a general notice published by the carrier, whatever may be its purport. If the carrier wishes to ascertain the extent of his risk, he should inquire at the time the goods are delivered; and then if he is not answered truly, he will have a defence. See 4 Bing. 218. A different rule practically changes the burden of proof. At the Common Law, it is enough that the owner prove the undertaking of the carrier, and that the goods did not reach their destination. But this doctrine of

implying fraud from a notice, requires him to go further, and show that he complied with the terms of the advertisement. He may have informed the carrier truly of the value of the goods — there may be no fraud, but still he is required to prove himself innocent before he can recover. Independent of a notice, the *onus* would rest, where upon general principles it ought to rest, on him who imputes fraud; and the carrier could not discharge himself without showing some actual misrepresentation or fraudulent concealment. It does not lie on the employer to show how the loss was occasioned, or that he has acted properly; but the law presumes against the carrier, until he proves that the loss happened by means or under circumstances for which he is not answerable. 1 T. R. 33; Murphy *v.* Staton, 3 Munf. (Va.) 239; Story on Bailm. 338.

But it is enough for this case, that the question of fraud can never arise under such a notice as was given by the defendant. He did not say to the public that he would not be answerable for baggage beyond a certain sum, unless the owner disclosed the value; he said he would not be answerable in any event. It was, in effect, a notice that he would not abide the liabilities which the law, upon principles of public policy, had attached to his employment. If the notice can aid the defendant in any form, it certainly does not go to the question of fraud.

The only remaining ground of argument in favor of the carrier is, that a special contract may be inferred from the notice. Independent of the modern English cases, it seems never to have been directly adjudged that the liability of the carrier can be restricted by a special contract. Noy, (Maxims,) 92, after speaking of a loss by negligence, says: — "If a carrier would refuse to carry unless a promise were made to him that he should not be charged with any such miscarriage, that promise were void." If he cannot stipulate for a partial, it is difficult to see how he can for a total exemption from liability. In Nicholson *v.* Willan, 5 East, 513, Lord Ellenborough found no direct adjudication in favor of the position, that a carrier may limit his responsibility by a special contract; but he relied on the fact that such an exemption had never been "by express decision denied." Although this mode of reasoning is not the most conclusive, I shall not deny that the carrier may by express contract restrict his liability; for though the point has never been expressly adjudged, it has often been assumed

as good law. Aleyn, 93; 4 Co. 84, note to Southcote's case; 4 Burr. 2301, per Yates, J.; 1 Vent. 190, 238; Peake, N. P. Cas. 150; 2 Taunt. 271; 1 Stark. R. 186. If the doctrine be well founded, it must, I think, proceed on the ground that the person intrusted with the grounds, although he usually exercises that employment, does not in the particular case act as a common carrier. The parties agree that, in relation to that transaction, he shall throw off his public character, and, like other bailees for hire, only be answerable for negligence or misconduct. If he act as a carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law.

But, conceding that there may be a special contract for a restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried, after seeing a notice, that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods, subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can, at the most, only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice, cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special

contract cannot be implied where there is such an equipoise of probabilities.

Making a notice the foundation for presuming a special contract, is subject to a further objection. It changes the burden of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods; and it would then lie on the carrier to discharge himself by showing a special contract for a restricted liability. But giving effect to the notice, makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving the *onus* of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, that he did not assent.

After all that has been or can be said in defence of these notices, whether regarded either as a ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact, that they are a mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the legislature, and not by the Courts. It has been admitted over and over again by the most eminent English Judges, that the effect given to these notices was a departure from the Common Law; and they have often regretted their inability to get back again to that firm foundation. The doctrine, that a carrier may limit his responsibility by a notice, was wholly unknown to the Common Law at the time of our Revolution. It has never been received in this, nor, so far as I have observed, in any of the other States. The point has been raised, but not directly decided. Barney *v.* Prentiss, 4 Har. & Johns. R. 317; Dwight *v.* Brewster, 1 Pick. 50. Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence.

The act of parliament already mentioned, enumerates various articles of great value in proportion to the bulk, and others which are peculiarly exposed to damage in transportation, and declares that the carrier shall not be liable for the loss or injury of those articles when the value exceeds £10, unless at the time of delivery the owner shall declare the nature and value of the property, and pay the increased charge which the carrier is allowed to make for

his risk and care. If the owner complies with this requirement, the carrier must give him a receipt for the goods, "acknowledging the same to have been *insured;*" and if he refuse to give the receipt, he remains "liable and responsible *as at the Common Law.*" The provision extends to the proprietors of stage-coaches as well as all other carriers, and to property which may "accompany the person of any passenger" as well as other goods; and the statute declares that after the first day of September, 1830, "*no public notice* or declaration heretofore made, or hereafter to be made, *shall be deemed or construed to limit, or in anywise affect the liability at Common Law*" of any carriers; but that all and every such carrier shall be "liable *as at the Common Law* to answer" for the loss or injury of the property, "*any public notice* or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." The only modification of the Common Law rule in relation to carriers made by this statute, is that which requires the owner, without a special request, to disclose the nature and value of the package, when it contains articles of a particular description. The premium for care and risk, the carrier might have required before. In relation to all articles not enumerated, and in relation to those also, if the owner comply with the requirements of the act, the carrier is declared liable as an insurer, and must answer "*as at the Common Law.*" The whole doctrine which had sprung up under notices, is cut up by the roots; and in such language as renders it apparent that the legislature deemed it an innovation on the law of the land.

If, after a trial of thirty years, the people of Great Britain, whose interest and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the Common Law rule; we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud.

If the policy of the law in relation to carriers were more questionable than I think it is, it would be the business of the legislature, and not of the Courts, to apply the proper remedy. The

plaintiff is entitled to judgment in pursuance of the stipulation contained in the case.

The CHIEF JUSTICE concurred.

COWEN, J. concurred in the result, for the reasons assigned by him in the case of Cole *v.* Goodwin and Story, *post.*

Cole *v.* Goodwin and Story, (commonly cited Cole *v.* Goodwin.)

Supreme Court of the State of New York, May, 1838, (19 Wend. R. 251.)

Opinion of the Court by Cowen, J.

Respecting the power of common carriers to limit their Common Law liability as to the *safety* of the goods, by *notice;* and of their power by notice to require the owner of the goods to state the *nature* or *value* of the property.

This, like the preceding case of Hollister *v.* Nowlen, was an action against coach proprietors for the loss of the plaintiff's baggage, and the principal question arose out of the notice given by the defendants, "All Baggage at the Risk of the Owner." The opinion delivered by Mr. J. Bronson, in Hollister *v.* Nowlen, rendered it, he considered, unnecessary for him to examine the principal question, which is elaborately discussed by Mr. J. Cowen, as follows: —

But the more effectually to secure impunity for absolute carelessness, the defendants gave notice, that *all baggage was at the risk of the owner.* This, taken literally, is another mode of fastening all the duty on the passenger, exactly inverting the obligation imposed by law. It is saying, "I like your passage money and the emoluments of my public employment as a common carrier of passengers and their baggage. I will take my reward, but choose to consult my convenience and safety in the measure of responsibility." If the carrier have the legal power to restrict any branch of his liability, either by special contract or notice, it is certainly important to inquire, looking at the consequences, whether such power be arbitrary and illimitable. If it be, there is no end to this kind of encroachment; and the passenger may as well be required to risk his limbs or his neck.

All must agree with what was said on the argument, that a man may become a common carrier or not, at his option; and that he may limit his office to the carrying of persons *or* goods, as he

pleases, and at such general prices as he may choose to charge. 2 Kent's Com. 598, 3d ed. But his office as a common carrier once becoming fixed, and his line of travel, subjects of carriage, and prices established, it is much more questionable whether, in respect to passengers or goods which are fairly committed to him, he can qualify his public duty. It is agreed by all the books, that while he enjoys the privileges of a common carrier, there are certain duties pertaining to that office, which he cannot escape in any form. In the first place, he is bound to receive passengers and goods, if he have room, and carry them for a reasonable reward, which may set down as the accustomed reward for like services. 2 Kent's Com. 598, 3d ed., and cases there cited in note *f.*; per Mansfield, C. J., and Lawrence, J. in Harris *v.* Packwood, 3 Taunt. 271, 272; per Best, C. J. in Riley *v.* Horne, 5 Bing. 217; 2 Moore & Payne, 331, 338, S. C.

It is equally well settled that he cannot, either capriciously in a single instance, nor by public notice seen and read by his customer, nor even by special agreement, exonerate himself from the consequences of gross neglect. Per Best, C. J. in Riley *v.* Horne, 5 Bing. 218; 2 Moore & Payne, 331, 341, S. C.; Sleat *v.* Fagg, 5 Barn. & Ald. 342; Wright *v.* Snell, Id. 300; Birkett *v.* Willan, 2 Barn. & Ald. 356; Beck *v.* Evans, 3 Camp. 267; 16 East, 244, S. C.; Bodenham *v.* Bennett, 4 Price, 31; Smith *v.* Horne, 8 Taunt. 144; 2 Moore, 18, S. C.; Newborn *v.* Just, 2 Carr. & Payne, 76.

It is said in the Doct. and Student, Dial. 2, ch. 38, p. 224 of Machall's ed.: "If he [the carrier] would per case refuse to carry it unless promise were made unto him, that he shall not be charged for no misdemeanor that should be in him, the promise were void; for it were against reason and against good manners; and so it is in all other cases like." In Noy's Maxims, 92, it is said, "If a carrier would refuse to carry unless a promise were made to him that he shall not be charged with any such miscarriage, that promise is void." Gross negligence is in general a species of fraud, though it may not be always so. Story on Bailm. 13, § 19 to 22. And an agreement giving direct countenance to a fraud would be contrary to public policy. It is equally well settled that a special agreement, or, which is the same thing, a notice seen and acted upon by the owner of goods, will not protect the carrier against the conse-

quences of the malfeasance or misfeasance of himself or his servants, as if they convert the goods, or make a wrong delivery. Story on Bailm. 365, § 570, and the cases there cited. Beck *v.* Evans, 16 East, 244. Indeed, all this would be so, could we suppose the carrier's obligation brought down to that of a mere mandatary.

Passing below gross neglect and misfeasance, the balance of opinion in Westminster Hall would seem to be that the liability of the carrier may be dispensed with. Story on Bailm. 365, § 571, and cases there cited. I think Low *v.* Booth, 13 Price, 329, may be set down as a direct adjudication, that ordinary neglect may be provided against by the parties.

But the great question is, under what limitations may the parties provide for a reduction of the liability? For one, I hardly feel warranted to interpose a general denial that the *extraordinary responsibility* of the common carrier may be taken away by the joint act of the parties; and such I take a proper notice to be if known to the bailor. I agree that there is no adjudication of a date so ancient, that we are obliged to respect it as authority, giving the common carrier a right to take a fair reward for the carriage, and yet acquit himself of his obligation as such. Admitting the doctrine of notice to have that effect, and to be as old as Forward *v.* Pittard, 1 T. R. 27, as was said by Burrough, J. in Smith *v.* Horne, 8 Taunt. 144, 146; 2 Moore, 18, 22, S. C.; yet we are carried back no farther than 1785, about ten years after the revolution. And even so soon after, we find the learned Judge adding: — "It cannot but be lamented that such notices have ever been used, and recognized as a protection to carriers, to divest them of their responsibility." 2 Moore, 22. If he meant a general and arbitrary power of protection, I think every one must concur with him; but if he is to be understood as speaking to the extent of the case before him, it appears to me that the notice was very properly allowed to avail, both upon principle and authority. It was thus: — "that they (the carriers) would not hold themselves accountable for cash, writings, or any article above the value of £5, *unless entered and paid for according to its value, when delivered to their agents.* 2 Moore, 19; more briefly 8 Taunt. 144, 145. I am inclined to think, by what fell from Park, J. in the same cause, that both he and Burrough, J., must have alluded to the disposition of

carriers to extend their protection by notices beyond the principle on which they were originally allowed. Park, J. said: — "The indulgence given to carriers by limiting their responsibility by the notices usually affixed in their offices, has occasioned great public inconvenience. The Courts have lately been inclined to restrain them." 2 Moore, 21, 22. And they determined that even this, the usual and allowed notice, should not protect the defendants against gross negligence.

To appreciate in a proper manner the particular notice in question, it is necessary to advert briefly to the relative obligation of the carrier and owner. The former is an insurer against loss by any event except the act of God, (now holden to be synonymous with inevitable accident,) or the enemies of the republic. Per Holt, J. in Coggs *v.* Bernard, 2 Ld. Raym. 918; Forward *v.* Pittard, 1 T. R. 27, 33. To this may be added another exception; a loss by the fraud, and perhaps the gross neglect of the owner in a case where he owes a duty. Bradley *v.* Waterhouse, 3 Car. & Payne, 318; Whalley *v.* Wray, 3 Esp. N. P. C. 74. It follows, that the obligation of the owner is like that of other persons who cause their property to be insured. He must act in good faith, and at least, if he speak at all, give a correct account of every circumstance peculiarly within his own knowledge, which is material to the risk which the insurer incurs, according to the legal nature of his engagement. The case of Kenrig *v.* Eggleston, Aleyn, 93, was very severe upon the carrier. The plaintiff delivered a box to the carrier's porter, telling him there was a book and tobacco in it; in truth it contained £100 besides. The whole was lost, and the carrier held liable for the money. "It was agreed by the counsel, and given in charge to the jury, that if a box with money in it be delivered to a carrier, he is bound to answer for it if he be robbed, although it was not told him what was in it. And so it was ruled in one Barcroft's case, as Rolle said, where a box of jewels was delivered to a ferryman, who, knowing not what was in it, and being in a tempest, threw it overboard into the sea; and resolved that he should answer for it." Rolle finally directed, "that although the plaintiffs did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box. *But it must come on the carrier's part to make special acceptance.*" He left the question

of the intended cheat to the jury to consider in damages; and they found the whole £100, deducting £3 for carriage. It is indeed not surprising, as added by the reporter, "*quod durum videbatur circumstantibus.*" The general principle laid down in this case as derived from Barcroft's, so far from having been ever questioned, has been repeatedly affirmed, though it has been thought to have been there wrongly applied, inasmuch as there was evident artifice made use of to disguise the fact of there being money in the box. This case was decided in 24 Car. I. See per Best, C. J. in Riley *v.* Horne, before cited. There is a still stronger case against the carrier cited by Hale in Morse *v.* Slue, 1 Vent. 238.

In the case of Tyly *v.* Morrice, 11 Wm. III., Carth. 485, the plaintiffs' servant delivered to the defendant's book-keeper £450 in two sealed bags, and told him it was £200, which the book-keeper receipted in writing as "two bags of money sealed up, said to contain £200." The whole being lost by a robbery, the carrier paid £200, and the plaintiffs sued for the balance on the authority of Kenrig *v.* Eggleston. The Court distinguished the case, and confined the plaintiffs' claim to what had been paid, "Because there was a particular undertaking by the carrier for the carriage of £200 only, and his reward was to extend no farther than to that sum, and it is the reward which makes the carrier answerable; and since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded on the reward." The case of Fitchburne *v.* White, 5 Geo. I., Feb. 16th, 1718, is thus reported in 1 Str. 145. "Per King, Ch. J. If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But if the carrier *asks*, and the other says *no*, or if he accepts it *conditionally*, provided there is *no money it*, in either of these cases, I hold the carrier is not liable." Aleyn, 93, is cited as authority. The case of Gibbon *v.* Paynton, 4 Burr. 2298, approves of the general doctrine in Kenrig *v.* Eggleston, but thinks it misapplied. I have noticed these cases, and some of them at large, as showing, 1. that the carrier is liable in respect to his reward; but 2. that to raise in the law a respect to his reward, he must make a special acceptance, or at least *inquire* and obtain a positive representation. It follows, that if the plaintiff either answer untruly, or on request

refuse to make any reply whatever, the carrier may say either that he will not receive the goods, or that if he receives them, it shall not be as a common carrier; indeed, that he will not consider himself accountable as a bailee for reward. He may either refuse to receive pay for the carriage, or refuse to receive a premium beyond a certain amount. I forbear to go farther into the cases, because I think these general propositions are all substantially adjudged by this Court in the late case of the Orange Co. Bank *v.* Brown, 9 Wend. R. 85, 114, 115.

Then reading the cases on this subject, and especially that of Kenrig *v.* Eggleston, and Morse *v.* Slue, will any one say that the carrier shall be liable, where the owner refuses to concur in any reasonable request on his side to avoid imposition; to make every thing honest and fair? Was it unreasonable, then, in the carriers to demand, as in Smith *v.* Horne, that all over £5 should, in order to fix the carrier with loss, be entered and paid for according to its value? What is this but demanding what no one can deny, that the laborer shall be paid according to his hire? Is it unreasonable to make a condition that the owner shall be honest? How far it is so, let us see from another case, Gibbon *v.* Paynton, 4 Burr. 2290. The defendants had properly advertised, that their coachman would not be answerable for money or jewels or other valuable goods, unless he had notice that such were delivered to him; and it was probable that the plaintiff knew of the notice, and understood, that by the course of trade, money was not carried without an extra premium. Yet the plaintiff delivered to the coachman £100 hid in hay in an old nail bag. The bag and the hay were carried safely, but the money was lost. It was held, that the plaintiff could not recover. This case is remarkable as being among the earliest cases, if not the very first case in which the carrier's notice appears. It was in Easter Term, 9 Geo. III. A. D. 1769. Lord Mansfield proceeded entirely independent of the notice; he considered the plaintiff's conduct fraudulent, though he does not deny, that mere silence as to the amount may in general be honest, if the plaintiff be not called out by the carrier. Yates, J. considered the notice equivalent to a special acceptance. He said, "this was a special acceptance." Arston, J. also hinted at the same ground; and both he and Lord Mansfield laid great emphasis on the principle, that a carrier is liable in respect to his reward.

It is obvious, that if the owners are open to frauds when once the goods are committed to the hands of the carrier, the latter is equally exposed to imposition in the delivery; and while it is reasonable that he should demand notice of what he is called upon to transport, is it not equally reasonable that he should make other regulations as to booking the goods? Best, C. J. in Riley *v.* Horne, after mentioning as an excuse for using a printed notice, that "It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel, in which the value of the parcel should be specified, as well as the price to be paid for the carriage," proceeds, "But it would add very little to the labor of the book-keeper, if he entered the value of each package, and gave the person who brought it a written memorandum of such entry, like the slips now made on an agreement for a policy of insurance." I have yet to learn that any thing calculated to insure an exercise of good faith on either side, or a full understanding of the contract, or to furnish the proper evidence of the contract, may not be demanded. I will add, that all this is due to the safety of the carrier, whose means of providing even for his general security, as well as for that of the particular package, may be materially affected by temptations to robbery concealed from him in trunks, boxes, or old bags of hay, but perhaps known to others through the treachery of the owner's servants, and in flagrant cases, of the owner himself. I have already noticed in another connection, the importance of an entry to be transferred to the way-bill, as a guide for the carrier's agent at the point of destination and delivery.

Laboring under the difficulty of making inquiries or drawing up special acceptances in each case, and knowing that a silent acceptance on their part would open them to interminable frauds, carriers resorted to the notice as a proper substitute. If such as a carrier has a right to give, it is in its own nature and according to all the analogies of business, when brought home to the owner, and this must always be proved, a proposition, which, if followed by the delivery of the parcel, fastens upon the transaction the conditions or other terms specified. Bignold *v.* Waterhouse, 1 Maule & Selw. 255, is very strongly illustrative of this position. The defendants have given the usual notice, that value above £5 must be entered and paid for. That not being done, Lord Ellen-

borough, C. J., said, "There was no contract at all between the plaintiffs and defendants: in which case *non oritur actio.*" In Batson *v.* Donovan, 4 Barn. & Ald. 21, Best, J. and the whole Court agreed, that though the carrier must make the proper inquiries, yet "the effect of the notice is to prevent the necessity of a particular inquiry in each case." Harris *v.* Packwood, 3 Taunt. 264, is also, that unless the notice be complied with, there is no contract at all, and in case of loss, the plaintiff cannot recover even the lesser sum specified.

So long as the printed notice of a common carrier is confined to the purposes which I have enumerated, and others calculated to save himself, without mischief to his customer, or for the benefit of the latter, I see no objection in principle to give it full effect. So far it is not a refusal to carry for a reasonable reward. So far it is not a limitation of the carrier's liability. He merely declares to the customer what is true and just: "You know the value of your goods; I will not rummage your parcel: I will take your own account; but I will not incur the responsibility of a common carrier unless your account shall prove true. If you commit a fraud, or deal captiously or capriciously on your own part, you cannot complain if my duty is reduced to that of a mandatary."

I have taken pains to look at the English cases concerning carriers' notices, with a view to the principles mentioned; and, considering the loud and repeated complaints which have been made against them as a pernicious innovation, I have been disappointed to find them, with very few exceptions, confined within those principles, and well sustained both by authority and the analogy of the law of insurance. To deny that nearly all of them, I do not say quite all, so far as they give general effect to such notices, are not to enter into and form a part of our own law, would, it appears to me, be to rise against the united authority of Westminster Hall, both before and since the revolution. I do not speak of the various qualifications under which they have been received, arising from some differences of language in the notices themselves, diversity of circumstances to which they have been applied, or the conflict of judicial authority. These may justly form the subject of complaint. But to make a difficulty in understanding and applying the language of commercial instruments an objection to the instruments themselves, would long since have stricken many such from existence.

Most of the litigation upon this subject has arisen from notices said to have been got up with a view to protect carriers by land in wheel carriages or sleighs. The cases are very numerous, and I cannot pretend to cite them all; but will simply refer to such as I have found on considerable search, in order that it may be seen, whenever thought worth while, how nearly they all come in principle, and mostly even in words and letters, to the examples already exhibited from Smith *v.* Horne, and Gibbons *v.* Paynton. Vide Yate *v.* Willan, 2 East, 128; Izett *v.* Mountain, 4 Id. 371; Clark *v.* Gray, 6 Id. 564; 2 Smith, 262, and 4 Esp. 177, S. C.; Nicholson *v.* Willan, 5 East, 507, 2 Smith, 107, S. C.; Batson *v.* Donovan, 4 Barn. & Ald. 21; Thorogood *v.* Marsh, 1 N. Gow. 105; Covington *v.* Willan, Id. 115: Bignold *v.* Waterhouse, 1 Maule & Sel. 255; Riley *v.* Horne, 5 Bing. 217; Newborn *v.* Just, 2 Carr. & Payne, 76; Brooke *v.* Pickwick, 4 Bing. 218; Garnett *v.* Willan, 5 Barn. & Ald. 53; Sleat *v.* Fagg, Id. 342; Bradley *v.* Waterhouse, 3 Carr. & Payne, 318; Macklin *v.* Waterhouse, 2 Moore & Payne, 319, and Riley *v.* Horne, Id. 331, both these cases reported in 5 Bing. 217, under the title of Riley *v.* Horne; Roskell *v.* Waterhouse, 2 Stark. 461; Hutton *v.* Bolton, 3 Doug. 59; 1 H. Black. 298, S. C. note; Kerr *v.* Willan, 6 Maul. & Sel. 150; 2 Stark. R. 53, S. C.; Davis *v.* Willan, 2 Stark. R. 279; Alfred *v.* Horne, 3 Id. 136; Clayton *v.* Hunt, 3 Campb. 27; Butler *v.* Heane, 2 Id. 415; Rowley *v.* Horne, 10 Moore, 247; 3 Bing. 2, S. C.; Beck *v.* Evans, 16 East, 243; 4 Campb. 267, S. C.; Wilson *v.* Freeman, 3 Id. 527; Levi *v.* Waterhouse, 1 Price, 280; Low *v.* Booth, 13 Id. 329; Down *v.* Fromont, 4 Campb. 40; Munn *v.* Baker, 2 Stark. R. 255; Gougher *v.* Jolly, 1 Holt, N. P. Rep. 317; Cobden *v.* Bolton, 2 Campb. 108; Marsh *v.* Horne, 5 Barn. & Cress. 322; Bodenham *v.* Bennett, 4 Price, 31; Mahew *v.* Eames, 3 Barn. & Cress. 601; Clay *v.* Willan, 1 H. Black. 298. If, instead of looking at the original cases, any one be desirous of seeing their general character at a shorter glance, he will find many of them abstracted in Wheat. Selw. N. P., Carriers, 2; and still more copiously in 5 Petersd. Abr.; Carriers by Land, p. 64 to 86, Am. ed. with Ham. Suppl.; Carriers' Notices, effect of, p. 227 to 236.

These notices have, in some of their aspects, been occasionally vindicated, per Lawrence, J., in Harry *v.* Packwood, 3 Taunt. 264,

and Best, C. J., in Riley *v.* Horne. In the first case, Mansfield, C. J., complained of them as leading to frauds, by disclosures of value to persons standing around; but he adds, however inconvenient that may be, "it seems that from the days of Aleyn down to this hour, the cases have again and again decided that the liability of a carrier may be so restrained." Lord Ellenborough, in Down *v.* Fromont, 4 Campb. 40, expressed his sorrow that carriers had been allowed to limit their Common Law responsibility at all, and said that some legislative measure upon the subject would soon become necessary. Several statutes had then already been passed in England, fixing limits to the responsibility of carriers by water; and in 1830, the stat. 1 Wm. IV. 68, restrained the effect of the notice by land carriers, but adopted the great principle of the notice, by requiring the owner to state the value of certain enumerated articles to the carrier at the time of delivery. A short abstract of these statutes is given in 2 Kent's Comm. 605, and the note there. The statute of 1830 is stated more at large in Id. 607, note *c*. And it is handsomely abridged section by section, with all its provisions, in Smith's Mercantile Law, 170, 171.

Some few American books may be said to amount to a general recognition of the validity of the carrier's notice, without, however, fixing any boundary to its object or operation. Orange County Bank *v.* Brown, 9 Wend. 115, per Nelson, J.; Phillips *v.* Earle, 8 Pick. 182; Bean *v.* Green, 3 Fairfield, 422.

So much both for judicial and legislative action, the great mass of which has been directed to enforce a fair course of conduct on the side of the bailor. They all go upon the most obvious ground, that a man shall not raise an action in his favor out of his own fraud or neglect.

C. J. Best, 2 Moore & Payne, 341, 342, thus sums up the points which are material to the case before us: — "That a carrier is an insurer of the goods that he carries; that he is obliged for a reasonable reward to carry any goods that are offered him, to the place to which he professes to carry goods, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he do not ask for this information, or if, when he asks and is not answered, he still takes the goods, he is answerable for their amount, whatever that

may be; that he may limit his responsibility as an insurer by notice." It is the extent of this right of notice or of special acceptance, which is the important object of attention.

Suppose all the reasonable terms of the carrier complied with; the value disclosed, or the goods weighed, where that is required, as it may be, per Nelson, J., in Orange County Bank *v.* Brown, 9 Wend. 114, Munn *v.* Baker, 2 Stark. R. 255, the premium paid, or secured without inquiry, or according to value or weight, the goods booked and placed in the coach beyond the reach or the knowledge of the owner; having come hundreds of miles perhaps of his journey, relying on coach owners, who take all the benefits and privileges of common carriers, he meets on going into an office, *for the first time*, with the unqualified notice, "all baggage at the risk of the passenger." Suppose a case of no notice, but simple refusal to take on Common Law terms; no one will pretend that the carrier could enforce such a claim. Is the notice any thing more? It comes to the bailor's knowledge for the first time in his life. He is surprised with a declaration, that all his reliance for the safety of his baggage is gone, unless he shall, in case of its loss, have the luck to prove by the servants of the coach owner, the instruments of misfeasance or neglect, that one or the other has intervened. What is the reason that the Common Law will not excuse the carrier unless he show the act of God, or the enemies of the republic, or the misconduct of the plaintiff? This, says Lord Holt, "is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs require them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered." Coggs *v.* Bernard, 2 Ld. Raym. 918. Nor was this said of a barbarous people or a barbarous age; but in the reign of Queen Anne, of morals, arts, and arms, an age distinguished as the Augustan era of England. As late as 1828, in Riley *v.* Horne, Best, C. J. said: — "If the goods should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants,

and they, knowing that they could not be contradicted, would excuse their masters and themselves. 2 Moore & Payne, 337. It would be arrogant in any nation to claim a state of morals superior to those of England, and especially to Scotland, where the same rigor prevails; still more arrogant, not to say profane, to claim a national perfectibility so high as to rise above temptation. Chancellor Kent admires the steady and firm support which the English Courts have given to the salutary rule of law on this subject, without bending to popular sympathies, or yielding to the hardships of a particular case. 2 Kent's Comm. 601, 602, 3d ed.

Can the carrier in any way put an absolute limit in his own discretion on his own duty and responsibility, thus based upon foundations of public policy? In the first place, how stand the books? In Kirkman *v.* Shawcross, 6 T. R. 14, it was held, that dyers and bleachers might, by resolution and notice to their customers, enlarge their respective liens on goods bailed to them, so as to cover a general balance. But Lord Kenyon, C. J., differed the case from that of common carriers, who had no power to impose such terms. His words are: — "They have no right to say they will not receive any goods but on their own terms;" though he recognized their right to the notice protective against the fraud of the bailor. So he said of innkeepers, "who are bound to protect the property of their guests. Ashhurst, J., speaks of the obligation of innkeepers as *indelible*." The same distinction was recognized by Alvanley, C. J., in Oppenheim *v.* Russell, 3 Bos. & Pull. 42, 47. He was followed by Rook, J., in the same case. Chambre, J., added, that such a notice by a carrier would be "so manifestly *unreasonable and monstrous*, that I think no legal agreement can be implied from such a notice." In Lane *v.* Cotton, 1 Salk. 18, Holt, C. J., places the occupation of a carrier on the list of public employments, and adds that his undertaking is in proportion to his power and convenience. In the report of the same case, in 12 Mod., he thus groups the reasons for the duty of the carrier and the innkeeper: — "For what is the reason that a carrier or innkeeper is bound to keep such goods as he receives, at his peril? It is grounded upon great equity and justice; for if they were not chargeable for loss of goods, without assigning any particular default in them, they having such opportunity as they have by the trust reposed in them, to cheat all people, they would be so apt to play the rogue and cheat people,

without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconveniency would be very great. And though one may think it a hard case that a poor carrier, who is robbed on the road without any manner of default in him, should be answerable for all the goods he takes, yet the inconveniency would be far more intolerable if it were not so; for it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party; and the laws will not expose him to so great a temptation; but he must be honest at his peril." Taking the arguments of Holt and Best, a relaxation of the Common Law rigor opens the high road to fraud, perjury, larceny, and robbery. "Common carriers must not understand," says Lawrence, J., in Nicholson *v.* Willan, 2 Smith, 113, "that they can impose any terms which they please upon persons who send goods." Where is the boundary? The defendant, in the case before us, says the carrier himself is to prescribe it. If this be so, it is easy to see that the Common Law is overcome, for it never was thought that if this question were intrusted to the party instead of the law, the fences against damage and loss would stand for a moment. The case in hand is not an effort to secure a fair premium for carrying baggage. That premium is demanded and received in the name of passenger's fare. To say the contrary, is against common sense, and a shallow evasion; nor is it indeed presented. You cannot raise a distinction in this way between a passenger and his travelling trunk, which is to contain his clothes and money for travelling expenses, and his books, if he be on his way to college, as in this case.

I will now proceed to consider such few *dicta* and adjudications, as I have been able to find, in virtue of which I admit, if they are to prevail, the common carrier will himself hereafter give the law; and the result will be, that in the course of a short time no single person, properly sustaining that character, will be left in the State. To this effect, it is said, we have the opinion expressed on the occasion of a bill sent up from the House of Commons, some time after the decision in Smith *v.* Shepherd, in 1795, Abbott on Shipp. Pt. 3, ch. 4, § 1. In Lyon *v.* Mells, 1 Smith, 484, Lord Ellenborough, C. J., gives this account of the matter: "If the carrier is at liberty to refuse *absolutely* to carry money, he may also refuse to carry any thing else; but he is bound to take for a reasonable

reward. *There must be, therefore, some limitation.* A bill was brought into parliament to alter the law with respect to ship owners; but it was thrown out by the law lords, that the parties might relieve themselves against the liability *to the full extent*, by a *special notice* and agreement. This caused an alteration in the bills of lading, and also *several public notices*, which are mentioned in several cases in this Court." Morse *v.* Slue, 1 Ventr. 190, 238, a previous case in Carr. II., was deemed a very hard one on ship owners. The ship was robbed by a very strong force. The defendant, though acquitted by the jury of all fault, was yet held liable. The ship, being in *corpus comitatus*, as Hale said, on the cause being a second time taken up by the Court, was subject to the law of common carriers. Secondly, said he, "If the master would, he might have made a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens." The case of Lyon *v.* Mells, 1 Smith, 478, was itself of a most extraordinary character for the extent of exemption claimed under the notice; and though the Court were enabled to avoid deciding upon its general effect, it is worthy of remark, as showing to what lengths carriers immediately attempted to proceed under the favorable suggestion of the law lords. The notice was, that the defendant would not be responsible for any loss or damage to any cargo, unless it happened by want of ordinary care and diligence in the master and crew, and even then only to 10 per cent., this not to exceed the value of the vessel, &c., and if any person was desirous to subject the defendant for losses by the act of God or otherwise, he must make a special agreement and pay extra freight. The notice was signed by forty-nine owners of vessels at Hull, and published in due form. As the neglect proved was finally thought to be that of the *owner* himself, the case was held not to come within the notice, and the Court did not think it necessary to say definitely, whether it would protect against the negligence of the master and crew. The owner furnished a leaky vessel. And as to the 10 per cent. clause, that could be applied in reason only to losses which might happen by accident. 5 East, 428, S. C. At the close of the argument, as stated by Smith's Report, in which the utter illegality of the notice had been insisted on as contrary to the policy of the law, Lord Ellenborough, C. J., said, that if it should be necessary to decide the case upon general principles, it was of great import-

ance. This was said in 1804, and from it I clearly collect, that the power of carriers to qualify their duty to the owners, of goods fairly committed to them, was still open. This conspiracy among the ship owners at Hull to subvert the Common Law in respect to their own community, makes its first appearance to us in Ellis *v.* Turner, 8 T. R. 531, A. D. 1800. And in that case, I think the notice was at least shorn of its power to protect the owner against the misconduct of the master, by which the loss happened. Yet even this notice came short of some others, which were, as we shall see, subsequently allowed ; for it left the *owner* a privilege to get an insurance under a special contract.

The contest in respect to such sweeping qualifications seems to have been less frequent since the resistance they met in Lyon *v.* Mells, though Lord Tenterden, late Abbott, C. J., in his Treatise on Shipping, Pt. 3, ch. 4, § 8, p. 296, Story's ed. of 1822, has left on record an instance, in which he thinks that by the usual exception in the bill of lading, the master may stand protected against the loss by fire. Per Green, J.. in Gordon *v.* Buchanan, 5 Yerg. 71, 82, S. P. In other respects, the liability of both master and owners, as common carriers, has in England been modified by statutes, though these do not, like the statute there in respect to land carriers, expressly preclude the proper notice, or other mode of stipulation for farther protection. Smith's Mercantile Law, 182 to 184 ; Id. 170, 171 ; Abbott on Shipp. Pt. 3, ch. 5, Story's ed. 1822, p. 297 to 303. But the statutes have probably been the main reliance of ship owners.

The later English books are, however, by no means barren of cases going all lengths to the absolute protection of the carrier, both by water and land. In Evans *v.* Soule, 2 Maule & Selw. 1, a carrier by water from Bristol to Worcester, was allowed to protect himself against a loss in consequence of the vessel having sunk, under a public notice that all goods would be carried at the risk of the owners, unless the loss or damage should arise through the actual default of the master and mariners. The validity of the notice was not debated ; but the counsel for the plaintiff, after assuming that the notice was valid within Gibbon *v.* Paynton, 4 Burr. 2298, and Nicholson *v.* Willan, 5 East, 507, contended, that it had been waived by the mode of the defendant's dealing. That view was overruled, and judgment given for the defendant. This

decision was in 1813, Lord Ellenborough presiding, and we shall soon see how rapidly the easy surrender to a single encroachment, under the administration too of a very able jurist, led to a total conquest over what Chancellor Kent denominates, and every lawyer must agree to have been, a most salutary rule in the law of carriers. How far he may stand justified in complimenting the firmness of the English Courts in maintaining the rule, will also be seen. 2 Kent's Com. 601, 602, 3d ed. Its form may still figure in our books; but I venture to say, that if we yield one inch to the course of modern English adjudication, its spirit is gone. The obligation of common carriers will become as remarkable for its laxity as it has heretofore been for its rigor. I will only repeat, in respect to this case, what seems to me perfectly obvious; and which I have, if not very unsuccessful, made somewhat apparent to others, that the difference between the two cases from Burrow and East, and that of Evans *v.* Soule is, that the notices in the former went merely to protect against *the fraud of the bailor*, and the latter to conceal and favor fraud directed against the owner, and in favor of the party giving the notice. The one was for, and the other against, the public morals; the former said merely, "give me a due reward, and I will be accountable as a common carrier;" the latter, "give me the same reward," (for the carrier fixes it; it may be less, but may also be more,) "and yet I claim to throw all risk upon you, or such a degree of it as I please." In the former, the plaintiff sought to commit, and did commit actual frauds after express notice that he must be honest. He sought in that way to deprive the laborer of a reasonable reward for his hire. In the latter, he was paid all he demanded, and yet he refuses to carry under the obligation required by law.

Lathan *v.* Rutley, 2 Barn. & Cress. 20, was a question of pleading, and no farther touches the point before us, than as it was assumed at Nisi Prius by Abbott, C. J. and the counsel in the cause, that a common carrier by land might give a receipt for goods, "fire and robbery excepted." In Maving *v.* Todd, 1 Stark. R. 72, A. D. 1815, before Lord Ellenborough, C. J., the first question submitted was, whether the defendants stood in the relation of common carriers to the plaintiff; and it was held that they did. The goods had been destroyed by fire; but the defendants brought to the knowledge of the plaintiff a notice *that they would not be respon-*

sible for losses by fire. Holroyd submitted whether the defendants could exclude their responsibility altogether. This was going farther than had been done in the case of carriers, who had only limited their responsibility to a certain amount. His lordship said, " *Since they can limit it to a certain sum, I think they may exclude it altogether;* and that they may say we will have nothing to do with fire." Holroyd: " They were bound to receive the goods." Lord Ellenborough: " Yes; *but they may make their own terms.* I am sorry the law is so; it leads to very great negligence." And the plaintiff was nonsuited. This case certainly goes the whole length. The goods were committed to the carrier in perfect fairness. A subsequent case in the same volume, Leeson *v.* Holt, 1 Stark. R. 186, A. D. 1816, is still broader. The defendants, common carriers, received chairs of the plaintiff, to be carried from Nottingham to London; but they had published a notice, *that all packages of looking glass, plate glass, household furniture, toys, &c.* were to be *entirely at the risk of the owners, as to damage, breakage, &c.* The main question was, whether this notice had been brought to the knowledge of the plaintiff's agent; and the fact was submitted to the jury: in charging whom, Lord Ellenborough, C. J. said, " If this action had been brought twenty years ago, the defendants would have been liable, since, by the Common Law, a carrier is liable in all cases except two — where the loss is occasioned by the act of God, or of the king's enemies using an overwhelming force, which persons of ordinary means of resistance cannot guard against. It was found that the Common Law imposed upon carriers a liability of ruinous extent; and, in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever; so that under the terms of the present notice, if a servant of the carriers had in the most wilful and wanton manner destroyed the furniture intrusted to him, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement; and he must be taken to have so contracted, if he chooses to send his goods to be carried after notice of the conditions. The question then is, whether there was a special contract, &c." The jury found for the plaintiff, on the question of his agent having seen the notice. See Barney *v.*

Prentiss, 4 Har. & Johns. 317. Now in the first place, I feel quite happy to be assured by the charge of Lord Ellenborough, of what I think I had already collected from the cases, that there is no adjudication of a date anterior to the American Revolution, which sanctions the frittering away of the responsibility of a common carrier, by exceptions, provisoes, special acceptances, notices, or otherwise, for his own exclusive benefit, and having no respect to the duty of the bailor. The concluding note of Lord Coke to Southcote's case, cited to us from 4 Rep. 84, which, though no more than his own opinion, is yet high authority, has no specific application to the case of a carrier. He speaks of a special acceptance by bailees generally; and we have a distinction taken in Kirkman *v.* Shawcross, and Oppenheim *v.* Russell, against common carriers and innkeepers. And I feel quite confident that we have already seen a great deal of principle, and considerable in the shape of authority, and there is much more of both, running through the books, which go to sustain the distinction. With how much propriety Lord Ellenborough confined the date of the innovation to twenty years, is obvious by the previous remarks of Lord Kenyon, C. J. (A. D. 1793,) in Hyde *v.* Proprietors of the Trent and Mersey Navigation, 1 Esp. R. 36. He said, "There is a difference where a man is chargeable by law generally, and where on his own contract. Where a man is bound to any duty, and chargeable to a certain extent by operation of law, in such case, he cannot by any act of his own discharge himself — as in the case of common carriers, who are liable by law in all cases of losses, except those arising from the act of God, or of the king's enemies; they cannot discharge themselves from losses happening under these circumstances, by any act of their own; as by giving notice, for example, to that effect. But the case is otherwise where a man is chargeable on his own contract. There he may qualify it as he thinks fit." See also Jeremy's Law of Carriers, 36.

All that Lord Ellenborough said in the two cases cited from 1 Starkie, certainly presses upon the mind when applied to *ordinary bailees.* They may make their terms; and we have seen the same thing as to carriers, so far as the terms are protective against the abuses of the bailor, or for the reasonable protection of the bailee, without hurt or serious inconvenience to the former. Nor am I able to make any distinction between a notice and a receipt

or bill of lading. Being brought home to the plaintiff, the notice is equivalent to a special written contract. The cases, I believe, all agree in this. They may differ as to whether the restriction be a limitation of the contract, or only of damages under it, an exception or a proviso, and so may or may not be set forth in pleading; Clark *v.* Gray, 6 East, 564; Latham *v.* Rutley, 2 Barn. & Cress. 20, and the cases there cited; but the terms of the notice, when they are admissible, enter into the framework of the bargain, and must in some form be so regarded. The cases in Starkie are Nisi Prius decisions, indicating on their face the haste and want of books which are so common at the circuit; and yet it is claimed that they should at least strike a balance between conflicting authority, and surrender the law which shelters the travelling and trading community, to the discretion of its interested carriers. It is indeed true, as Lord Ellenborough remarks, that there is no stopping-place, no half-way house. If the carrier can divest himself of liability for destruction by one kind of accident, or by one servant, he may in the same way go through the catalogue. He may exonerate himself at least from all, except gross neglect or misfeasance; and even in respect to these, he compasses nearly the same end by inverting the *onus* and darkening the horizon of evidence. I have said, that relaxing the Common Law rigor opens the high road to fraud, perjury, theft, and robbery. It does more. Looking to the present ordinary, not to say universal means of travel and transportation, by coaches, railroads, steamboats, packets, and merchant vessels, the mere super-addition of negligence in respect to the safety of passengers and property, would constitute a most fearful item. There are no principles in the law better settled, than that whatever has an obvious tendency to encourage guilty negligence, fraud, or crime, is contrary to public policy. Such, in the very nature of things, is the consequence of allowing the common carrier to throw off or in any way restrict his legal liability. The traveller and bailor is under a sort of moral duress, a necessity of employing the common carrier under those legal arrangements, which allow any number of persons to assume that character, and thus discourage and supersede the provision for other modes of conveyance. My conclusion is, that he shall not be allowed in any form to higgle with his customer, and extort one exception and another, not even by express promise or special ac-

ceptance, any more than by notice. He shall not be privileged to make himself a common carrier for his own benefit, and a mandatary, or less, to his employer. He is a public servant, with certain duties defined by law; and he is bound to perform those duties. As Ashhurst, J. said of the duties of innkeepers in Kirkman *v.* Shawcross, they are *indelible*. An innkeeper is said to be indictable for extortion. Per Holroyd, J. in Ansell *v.* Waterhouse, 2 Chit. R. 4. The obligation of a jailor to keep his prisoners, is much like that of the carrier in keeping goods. Bac. Abr. Escape in Civil Ca. (H.) He is also a public servant, and bound to perform the duties of his office. To demand and take an agreement for a special acceptance of his prisoner, would be extortion, and the qualification therefore void. In my opinion the same consequences result from the public character and absolute duties of the common carrier. I therefore think the defendants in the case at bar must take the consequence of their obligation as common carriers, notwithstanding the notice to the plaintiff. Admitting that the plaintiff acceded in the clearest manner to the proposition in the notice, that his baggage should be carried on the terms mentioned, I think the contract thus made was void on his part, as contrary to the plainest principles of public policy. In thus holding, we follow the law, as it is expressly admitted by the English Judges to have stood at the period when our ancestors declared themselves independent. And while we thus fulfil our constitutional duty, we are not, like Westminster Hall, obliged to lament while we enforce the law.

The New Jersey Steam Navigation Company, Respondents and Appellants,

vs.

The Merchants' Bank of Boston, Libellants.

Supreme Court of the United States, (6 Howard's Rep. 344.)

A decree of the Circuit Court of Rhode Island affirmed, which was a judgment upon a libel *in personam* against a steamboat company for the loss of specie carried in their boat by one of the persons called "express carriers," and lost by fire in Long Island Sound.

[N. B. The following is so far an abridged Report of this case, that the arguments of counsel, and all the opinions of the Judges upon the question of *admiralty jurisdiction*, which was decided in favor of the libellants, are omitted. The portion of it which is given, is considered to be important, as illustrating the law in respect to the power of common carriers to restrict their Common Law responsibility, by *special contracts* and *notices*, and in respect to their responsibility for *negligence*, notwithstanding they have entered into such contracts, or given such notices; and also the law as to the liability of common carriers to be sued by an owner of goods delivered to them to be carried by an "*express*" *agent*.]

This was an appeal from the Circuit Court of the United States for the District of Rhode Island, in the exercise of admiralty jurisdiction.

In February, 1839, the State of New Jersey chartered a company by the name of the New Jersey Steam Navigation Company, with a capital of five hundred thousand dollars, for the purpose of purchasing, building, repairing, and altering any vessel or vessels propelled by steam, and in the navigation of the same, &c., &c.; under which charter they became proprietors of the steamboat Lexington.

On the 1st of August, 1839, the following agreement was made: —

"This agreement, made and entered into this 1st day of August, A. D. 1839, in the city of New York, by William F. Harnden, of Boston, Massachusetts, on the one part, and Ch. Overing Handy, President of the New Jersey Steam Navigation Company, of the other part witnesseth:

"That the said William F. Harnden, for and in consideration of the sum of two hundred and fifty dollars per month, to be paid monthly to the said New Jersey Steam Navigation Company, is to have the privilege of transporting in the steamers of said company, between New York and Providence, via Newport and Stonington, not to exceed once on each day, from New York and from Providence, and as less frequently as the boats may run between and from said places, one wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length, (contents unknown,) until the 31st of December, A. D. 1839, and from this date.

"The following conditions are stipulated and agreed to, as part of this contract to wit: — The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company.

"Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise: —

"'Take notice. — William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be, and is transported, in respect to it or its contents, at any time.'

"Further, that the said Harnden is not to violate any provisions of the post-office laws, nor to interfere with the New Jersey Steam Navigation Company in its transportation of letters and papers, nor to carry any powder, matches, or other combustible materials of any kind, calculated to endanger the safety of said boats, or the property or persons on board of them.

"And that this contract may be at any time terminated by the

New Jersey Steam Navigation Company, or by the said Harnden, upon one month's notice given in writing.

"Further, that a contract made by the said Harnden with the Boston and New York Transportation Company, on the 5th day of July, A. D. 1839, is hereby dissolved by mutual consent.

"In witness whereof, the said William F. Harnden has hereunto set his hand and seal, and the President of the said New Jersey Steam Navigation Company has hereto affixed his signature and the corporate seal of the company.

"Wm. F. Harnden, [L. S.]
Ch. Overing Handy, *President.*

"Sealed and delivered in presence of
Roswell E. Lockwood."

It is proper to remark, that, prior to the date of this agreement, Harnden had made a similar one with the Boston and New York Transportation Company, which became merged in the New Jersey Steam Navigation Company on the 1st of August, 1839. Harnden, having begun to advertise in the newspapers in July 1839, whilst his contract with the Boston company was in force, continued to use the name of that company in the following advertisement, which was inserted in two of the Boston newspapers, until the end of the year 1839.

"Boston and New York Express Package Car. — Notice to Merchants, Brokers, Booksellers, and all Business Men.

"Wm. F. Harnden, having made arrangements with the New York and Boston Transportation, and Stonington and Providence Railroad Companies, will run a car through from Boston to New York, and *vice versa*, via Stonington, with the mail train, daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing goods, collecting drafts, notes, and bills, and will transact any other business that may be intrusted to his charge.

"Packages for Philadelphia, Baltimore, Washington, New Ha-

ven, Hartford, Albany, and Troy, will be forwarded immediately on arrival in New York.

"N. B. Wm. F. Harnden is alone responsible for any loss or injury of any articles or property committed to his care ; nor is any risk assumed by, or can any be attached to, the Boston and New York Transportation Company, in whose steamers his crates are to be transported, in respect to it or its contents, at any time."

The above-mentioned contract with the New Jersey Steam Navigation Company being about to expire, Harnden addressed letters, on the 7th and 16th of December, to the President, expressing a desire to renew it, and, on the 31st of December, received a letter from Mr. Handy, the President, renewing the contract for one year from the 1st of January, 1840.

The New Jersey Company also published the following notice :

"Notice to Shippers and Consignees.

"All goods, freight, baggage, bank bills, specie, or any other kind of property, taken, shipped, or put on board the steamers of the New Jersey Steam Navigation Company, must be at the risk of the owners of such goods, freight, baggage, &c. : and all freight, consisting of goods, wares, and merchandise, or any other property landed from the steamers, if not taken away from the wharf without delay, will be put under cover at the risk of the owners of said goods, freight, baggage, &c., in all respects whatsoever."

The bills of lading, or receipts given by the Company, were in the following form : —

"New Jersey Steam Navigation Company.

"Received of on board the steamer
master
marked and numbered as in the margin, to be transported to
and there to be delivered to
or assigns, danger of fire, water, breakage, leakage, and all other accidents excepted ; and no package

whatever, if lost, injured, or stolen, to be deemed of greater value than two hundred dollars.

" Freight as customary with the steamers on this line.

" N. B. The Company are to be held responsible for ordinary care and diligence only in the transportation of merchandise, and other property, shipped or put on board the boats of this line.

" Dated at the 18

" (Contents unknown.) "

In January, 1840, Mr. Harnden received from the Merchants' Bank in Boston a large amount of checks and drafts upon New York, which he was to collect in specie, and transmit the proceeds to Boston.

" On the 13th of January, 1840, the sum of eighteen thousand dollars, in gold and silver coin, was shipped by William F. Harnden, and received on board of the steamboat Lexington, said boat being the property of the New Jersey Steam Navigation Company, and employed in making regular trips between New York and Stonington in Connecticut. The shipment was made at New York. The boat left New York about half-past four o'clock in the afternoon, and in the course of a few hours a fire broke out, which totally destroyed the boat, the lives of nearly all the passengers and crew, and the property on board. The money, amongst the other property, was lost. As the circumstances under which the loss took place were much commented on in the argument, it may be proper to insert the narrative of Stephen Manchester, the pilot, who was examined as a witness : —

" To the third interrogatory he saith : — She was near Huntington lighthouse, some four miles east of the light, and between forty and fifty miles from New York. It was about half-past seven o'clock in the evening. I know the hour, because we always take down on a slate the hour that we pass every lighthouse. This was the business of the pilot. I was in the wheel-house when I heard that the boat was on fire. Some one came to the wheel-house, and told the wheel-man and myself that the boat was on fire. I stepped out of the wheel-house and went up to the smoke-pipe. I saw the fire blazing up through the promenade deck, around the smoke-pipe. The promenade deck was on fire, and was blazing up two or three feet. I looked down a scuttle which

went through the promenade deck, and which was about three or four feet on the larboard side, a little abaft of the smoke-pipe; it was not exactly abreast of it or abaft of it, but quartering. The scuttle led down between the after part of the boiler and the forward part of the engine. In looking through the scuttle I saw blaze and smoke, as if she was on fire there. I can't say whether or not the main deck was on fire at that time. I next returned to the wheel-house, and hove the wheel hard over a-port, which would sheer the boat to the southward, for the purpose of running the boat ashore to the nearest land, which was Long Island shore. Just as I got the wheel hove a-port, Captain Childs came in and put his hand on the spoke of the wheel. As he took hold of the wheel, the starboard wheel-rope gave way. Within an instant from that time, the smoke broke into the wheel-house, so that we were obliged to leave it. Captain Childs went out of the wheel-house and went aft, and I did not see any thing of him after that. I then stepped out, and called to some of our people on the forecastle to get out the fire-engine. They got it out. I then told them to get out the hose and the fire-buckets. The fire then spread so between decks, that they could not get at the hose or buckets. I then went to the life-boat, and found some men there casting off the lashings, with which she was fastened to the promenade deck. I caught hold of the lashings, and told them not to cast them off till we had attached a hawser to the boat. I sang out to some one on the forecastle to pass up a hawser to attach to the boat, which was done. I then told them to take the hawser attached to the boat, and to fasten it to the forward part of the steamer. The fire then was burning up through the deck and around the life-boat, and I cut the lashings, and told the men to throw the boat overboard; I then jumped down on to the forward deck, caught hold of the hawser, and found that it was not made fast to the steamboat, as directed. I found the boat was getting away from us, and I sang out to the people about there to hang on to the hawser, or we should lose her. They let go of the hawser, one after another, until they let the boat go. The promenade deck was at that time all of a blaze to the bulkhead. It was about fifteen or twenty minutes after I first heard of the fire that the life-boat was let go. The life-boat was somewhat burnt before she was thrown over. The next thing I, with the others on the forecastle did, was

to empty the baggage-cars, and attach lines to them, and throw them overboard for any one to save himself that could. Some of those on the forecastle drew water with what buckets we had, and threw it on the fire. I then took the flagstaff and another spar that we had knocked off the bulwarks, and fastened them to those two spars to make a raft to get on to. I threw the raft overboard; and several persons, some two or three, got on to it; but it was not buoyant enough to hold them up. That was all we could do, excepting to throw water, which we did as long as we could. The boat was then nearly burnt to the water's edge, and the forward deck was burnt and had fallen in. We then got cornered up so that we had no chance to throw water, and were obliged to leave the boat to burn. Those left on the forecastle, some eight or ten in number, then asked me what they could do to save themselves. I then told them that I saw no chance; that we had done all that we could do. We then began to get overboard; some hung on to the crates at the forward part of the boat, and some got on to the guard. I got down on to the raft I have before mentioned. I found it sinking under me, and I lifted myself up again by a piece of rope which I had, and which I whipped over a spike. Then I jumped from the raft on to the piece of guard; and from this guard I got on to a bale of cotton. I found a man by the name of McKinney on the bale. After I had got on, a man standing on this piece of guard asked if there was room on the bale of cotton for another man. I made him no answer. He jumped to get on to it, and in doing so knocked off McKinney. I hauled McKinney on to the bale again, and the man returned to the guard. I found the bale was lashed to this piece of guard, and I took my knife and cut away the lashings; I took up a piece of board which was floating by, and shoved the bale clear of the guard, and let it drift down the Sound before the wind. McKinney froze to death about daylight the next morning, and fell off the bale. Between eleven and twelve o'clock the next day, I was picked up by the sloop Merchant, Captain Meeker. When I first heard that the boat was on fire, I had been in the wheel-house, after taking my tea, for about twenty-five or thirty minutes."

On the 10th of February, 1842, the Merchants' Bank filed a libel in the District Court of the United States for the District of

Rhode Island, against the New Jersey Steam Navigation Company, as the owners of the Lexington, for "a cause of bailment, civil and maritime." As the libel is not long, and the circumstances of this case are peculiar, it is deemed proper to insert it.

"To the Honorable John Pitman, Judge of the District Court of the United States, within and for the District of Rhode Island.

"The libel and complaint of the President, Directors, and Company of the Merchants' Bank of Boston, a corporation incorporated by the legislature of the Commonwealth of Massachusetts, against the New Jersey Steam Navigation Company, a corporation incorporated by the legislature of the State of New Jersey, owners of the steamboat Lexington, for a cause of bailment, civil and maritime:

"And thereupon the said President, Directors, and Company of the Merchants' Bank of Boston do allege and articulately propound as follows: —

"First. That the respondents, in the month of January, in the year of our Lord one thousand eight hundred and forty, were common carriers of merchandise on the high seas from the city of New York, in the State of New York, to Stonington, in the State of Connecticut, and were then owners of the steamboat Lexington, then lying at the port of New York, in the State of New York, and which vessel was then used by the respondents as common carriers, as aforesaid, for the transportation of goods, wares, and merchandise on the high seas from the said port of New York to the said port of Stonington, in the State of Connecticut.

"Second. That the complainants, on the high seas, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this Court, on the thirteenth day of January, A. D. 1840, contracted with the respondents for the transportation, by water, on board of the said steamboat Lexington, from the said port of New York to the said port of Stonington, of certain gold coin, amounting to fourteen thousand dollars, and of certain silver coin, amounting to eleven thousand dollars, to the libellants belonging; and the said respondents then and there, for a reasonable hire and reward, to be paid by the libellants therefor, contracted with the libellants that they would receive said gold coin and silver coin on board of the said steamboat Lexington, and transport the same therein on the high seas from the said New York to said Stonington, and safely deliver the same to the libellants.

"Third. That the libellants, on the said thirteenth day of January, A. D. 1840, at said New York, delivered to the said respondents on board of the said steamboat Lexington, then lying at said New York, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this Court; and the respondents then and there received on board of said steamboat, the said gold coin and silver coin, for the purpose of transportiug the same by water on the high seas from said New York to said Stonington, and to deliver the same to the libellants as aforesaid.

"Fourth. That the steamboat Lexington sailed from said port of New York, with the said gold coin and silver coin on board, on said thirteenth day of January, A. D. 1840, and bound to said port of Stonington; yet the respondents, their officers, servants, and agents, so carelessly and improperly stowed the said gold coin and silver coin, and the engine, furnace, machinery, furniture, rigging, and equipments of the said steamboat were so imperfect and insufficient, and the said respondents, their officers, servants, and agents, so carelessly, improperly, and negligently managed and conducted the said steamboat Lexington during her said voyage, that, by reason of such improper stowage, imperfect and insufficient engine, furnace, machinery, furniture, rigging, and equipments, and of such careless, improper, and negligent conduct, the said steamboat, together with the said gold coin and silver coin to the libellants belonging, were destroyed by fire on the high seas, and wholly lost.

"Fifth. That by reason of the destruction of the said steamboat Lexington, and of the said gold coin and silver coin, the libellants have sustained damage to the amount of twenty-five thousand dollars.

"Sixth. That the said New Jersey Steam Navigation Company are possessed of certain personal property within the said Rhode Island district, and within the ebb and flow of the sea, and within the maritime and admiralty jurisdiction of this Court, to wit, of the steamboat called the Massachusetts, her tackle, apparel, furniture, and appurtenances, and of other personal property.

"Seventh. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Court; in verification whereof, if denied, the libellants crave leave to refer to the depositions and other proof to be by them exhibited in the cause.

Wherefore, the libellants pray that process, in due form of law according to the course of admiralty and of this Court in causes of admiralty and maritime jurisdiction, may issue against the respondents, and against the said steamboat Massachusetts, her tackle, apparel, furniture, and appurtenances, or any other property to the respondents belonging within the said Rhode Island district; and that the said property, or any part thereof, may be attached and held to enforce the appearance of the respondents in this Court, to answer the matters so articulately propounded, and to answer the damages which may be awarded to the libellants for the causes aforesaid; and that this Court would be pleased to pronounce for the damages aforesaid, and to decree such damages to the libellants as shall to law and justice appertain."

On the same day, a monition and attachment were issued, directing the steamboat Massachusetts, her tackle, apparel, furniture, and appurtenances, or any other property to the respondents belonging, within the Rhode Island district, to be attached. All of which was done.

In May, 1842, the respondents filed their answer, which is too long to be inserted. The substance of it was: —

1st. They admitted the ownership of the Lexington, and her being used for the transportation of passengers, goods, wares, and merchandise between New York and Stonington.

2d. They denied any contract whatever with the libellants.

3d. They denied that the libellants ever shipped, or that the respondents received from the libellants, any gold and silver coin whatever.

4th. They asserted that whatever goods were received on board the Lexington were received under the advertisements and notices mentioned in a previous part of this statement.

5th. That the usage and custom of the company was to be held responsible for ordinary care and diligence only; and that this usage, being well know to the libellants, constituted a part of the contract of shipment.

6th. That the bill of lading, heretofore mentioned, was a copy of all the bills of lading given by the company, which was well known to the libellants.

7th. That the notice above mentioned was posted up on board

the steamboat, and on the wharf, and in the office of the company, of which facts the libellants were informed.

8th. That the Lexington was accidentally destroyed by fire.

9th. They denied that the cotton was improperly stowed; that the engine, machinery, &c. were imperfect and insufficient; that the officers carelessly, improperly, or negligently managed the boat; or that by reason of these things the boat was lost. The contrary of all these things was averred; and they further averred, that they had complied with the requisitions of the act of Congress passed on the 7th of July, 1838.

In verification of this last averment, they filed the inspection certificate, dated on September 23d, 1839.

On the 18th of October, 1842, the District Court pronounced a *pro forma* decree, dismissing the libel with costs, from which an appeal was taken to the Circuit Court.

Under the authority of the Circuit Court, commissions to take testimony were issued, under which a vast mass of evidence was taken on both sides.

The libellants offered evidence to prove the following positions: That the furnaces were unsafe and insufficient; that there was no proper casing to the steam-chimney, nor any safe lining of the deck where the chimney passed through; that dry pine wood was habitually kept in a very exposed situation; that especially, there was a very improper stowage or disposition of the cargo on board, considering what that cargo was; that the boat had no tiller chain or rope, such as the act of Congress, as well as common prudence, required; that there were on board no fire-buckets, properly prepared and fitted with heaving-lines; that the fire-engine was in one part of the boat, while the hose belonging to it was kept or left in another, and where it was inaccessible when the fire broke out; and that in other respects the respondents were guilty of negligence the more culpable, as the same boat had actually taken fire in her last preceding voyage, and no measure of caution had been taken to prevent a recurrence of the accident.

The respondents, on the contrary, offered evidence to rebut that adduced in support of the above, and particularly that the boat, hull, engine, boiler, and general equipment were good; that the most experienced men had been employed, without regard to expense, in putting her into complete order; that she had a cap-

tain, pilot, and crew equal to all ordinary occasions, and that respondents were not liable if they did not prove fit for emergencies which might appall the stoutest; that the boat was well found in tool-chests; that there were on board a suction-hose, fire-engine, and hose, as required by the act of Congress; that they were stowed in a proper place; that sufficient reasons were shown why they were not available at the fire; that there were three dozen and a half of fire-buckets on board; that the steering apparatus was good; that the loss of the boat did not result from her not having "iron rods and chains" instead of wheel or tiller ropes;" that the parting of the wheel-ropes, if occasioned by the fire, did not contribute at all to her loss.

At November term, 1843, the cause came on to be heard before the Circuit Court, when the Court pronounced the following decree:

"This cause came on to be heard upon the libel, the answer of the respondents, and testimony in the case. The respondents submitted to a decree.

"Whereupon it is ordered, adjudged, and decreed, that the said libellants have and recover of the said respondents the sum of twenty-two thousand two hundred and twenty-four dollars, and costs of suit, and that execution issue therefor according to the course of the Court."

An appeal from this decree brought the case up to this Court.

The Reporter understands that Mr. Chief Justice Taney, Mr. Justice McLean, and Mr. Justice Wayne, concurred in the following opinion.

Mr. Justice Nelson. — This is an appeal from the Circuit Court of the United States, held in and for the District of Rhode Island, in a suit originally commenced in the District Court in Admiralty, and in which the Merchants' Bank of Boston were the libellants, and the New Jersey Steam Navigation Company the respondents.

The suit was instituted upon a contract of affreightment, for the purpose of recovering a large amount of specie lost in the Lexington, one of the steamers of the respondents running between New York and Providence, which took fire and was consumed, on the night of the 13th of January, 1840, on Long Island Sound, about

four miles off Huntington lighthouse, and between forty and fifty miles from the former city.

The District Court dismissed the libel *pro forma*, and entered a decree accordingly. An appeal was taken to the Circuit Court, where this decree of dismissal was reversed, and a decree entered for the libellants for the sum of $22,224, with costs of suit.

The case is now before this Court for review.

William F. Harnden, a resident of Boston, was engaged in the business of carrying for hire small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between these cities as the mode of transportation. For this purpose, he had entered into an agreement with the respondents on the 5th of August, 1839, by which, in consideration of $250 per month, to be paid monthly, they agreed to allow him the privilege of transporting in their steamers between New York and Providence a wooden crate of the dimensions of five feet by five feet in width and height, and six feet in length, (contents unknown,) until the 31st of December following, subject to these conditions: —

1. The crate with its contents to be at all times exclusively at the risk of the said Harnden, and the respondents not in any event to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, &c., to be conveyed or transported by him in said crate, or otherwise in the boats of said company.

2. That he should annex to his advertisements published in the public prints, the following notice, and which was, also, to be annexed to his receipts of goods or bills of lading: —

"Take notice. — William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time."

This arrangement expired on the 31st December, 1839, but was on that day renewed for another year, and was in existence at the time of the loss in question.

A few days previous to the loss of the Lexington, the libellants employed Harnden in Boston to collect from the banks in the city

of New York checks and drafts to the amount of about $46,000, which paper was received by him and forwarded to his agent in that city, with directions to collect and send home the same in the usual way. Eighteen thousand dollars of this sum was put in the crate on board of that vessel on the 13th of January, for the purpose of being conveyed to the libellants, and was on board at the time she was lost, on the evening of that day.

Upon this statement of the case, three objections have been taken by the respondents to the right of the libellants to recover:

1. That the suit is not maintainable in their names. That, if accountable at all for the loss, they are accountable to Harnden, with whom the contract for carrying the specie was made.

2. That if the suit can be maintained in the name of the libellants, they must succeed, if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and,

3. That the District Court had no jurisdiction, the contract of affreightment not being the subject of admiralty cognizance.

We shall examine these several objections in their order.

I. As to the right of the libellants to maintain the suit.

They had employed Harnden to collect checks and drafts on the banks in the city of New York, and to bring home the proceeds in specie. He had no interest in the money, or in the contract with the respondents for its conveyance, except what was derived from the possession in the execution of his agency. The general property remained in the libellants, the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the shipment, would fall upon them.

This would be clearly so if Harnden is to be regarded as a private agent; and even if in the light of a common carrier of this description of goods, the result would not be changed, so far as relates to the right of property.

The carrier has a lien on the goods for his freight, if not paid in advance; but subject to this claim he can set up no right of property or of possession against the general owners. (Story on Bailments, § 93 *g*.)

The carrier, says Buller, J., is considered in law the agent or servant of the owner, and the possession of the agent is the possession of the owner. (4 T. R. 490.)

Under these circumstances, the contract between Harnden and the respondents for the transportation of the specie was, in contemplation of law, a contract between them and the libellants; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their names.

It would be otherwise, in a court of law, if the contract was under seal. (Story on Agency, § 160.)

It rested in parol, in this case, at the time of the loss.

In Sims *v.* Bond, 5 Barn. & Adol. 393, the Court observed that it was a well established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.

The same doctrine is affirmed by Baron Parke, in delivering the judgment of the Court in Higgins *v.* Senior, 8 Mees. & Wels. 834, 844, in the Court of Exchequer. In that case, it was held that the suit might be maintained on the contract, either in the name of the principal or of the agent, and that, too, although required to be in writing by the statute of frauds.

The rule is, also, equally well established in this country, as may be seen by a reference to the cases of Beebee *v.* Robert, 12 Wend. 413; Taintor *v.* Prendergast, 3 Hill, 72; and Sanderson *v.* Lamberton, 6 Binney, 129.

The last case is like the one before us. It was an action by the owners directly upon the sub-contract made by the first with the second carrier for the conveyance of the goods, in whose hands they were lost.

The cases are numerous in which the general owner has sustained an action of tort against the wrongdoer for injuries to the property while in the hands of the bailee. The above cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The Court look to the substantial parties in interest, with a view to avoid circuity of action; saving, at the same time, to the defendant all the rights belonging to him if the suit had been in the name of the agent.

We think, therefore, that the action was properly brought in the name of the libellants.

II. The next question is as to the duties and liabilities of the respondents, as carriers, upon their contract with Harnden. As the libellants claim through it, they must affirm its provisions, so far as they may be consistent with law.

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident, — in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.

The question is, to what extent has this agreement qualified the common law liability?

We lay out of the case the notices published by the respondents, seeking to limit their responsibility, because, —

1. The carrier cannot in this way exonerate himself from duties which the law has annexed to his employment; and,

2. The special agreement with Harnden is quite as comprehensive in restricting the obligation as any of the published notices.

A question has been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of Gould and others *v.* Hill and others, 2 Hill, 623, and the conclusion arrived at that he could not. See also Hollister *v.* Nowlen, 19 Wend. 240; and Cole *v.* Goodwin, Ibid. 272, 282.

As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property, — the safe custody and delivery of the goods, — we are unable to perceive any well founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.

The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but

as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.

The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter-parties, where the exception to the Common Law liability (other than that of inevitable accident) has been, from time to time, enlarged, and the risk diminished, by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted.

But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the Court in the case of Hollister *v.* Nowlen, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualfication.

The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.

The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage.

The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties,

upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands.

This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailm. § 570); nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle, or mode of conveyance used in the transportation. (13 Wend. 611, 627, 628.)

Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person, engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation.

This rule, we think, should govern the construction of the agreement in question.

If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties.

The respondents having succeeded in restricting their liability as carriers, by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, lies on the libellants, which would be otherwise in the absence of any such restriction. We have accordingly looked into the proofs in the case, with a view to the question.

There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and alongside of the boiler-deck, and around the steam-chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton around the chimney extended from the boiler to within a foot of the upper deck.

The fire broke out in the cotton next the steam-chimney, between the two decks, at about half-past seven o'clock in the evening, and was discovered before it had made much progress. If the vessel had been stopped, a few buckets of water, in all probability, would have extinguished it. No effort seems to have been made to stop her, but, instead thereof, the wheel was put hard a-port, for the purpose of heading her to the land. In this act, one of the wheel-ropes parted, being either burnt or broken, in consequence of which the hands had no longer any control of the boat.

Some of them then resorted to the fire-engine, but it was found to be stowed away in one place in the vessel, and the hose belonging to it, and without which it was useless, in another, and which was inaccessible in consequence of the fire.

They then sought the fire-buckets. Two or three only, in all, could be found, and but one of them properly prepared and fitted with heaving-lines ; and, in the emergency, the specie boxes were emptied and used to carry water.

The act of Congress (5 Statutes at Large, 306, § 9) made it the duty, at the time, of these respondents to provide, as a part of the necessary furniture of the vessel, a suction hose and fire-engine, and hose suitable to be worked in case of fire, and to carry the same on every trip, in good order ; and further provided, that iron rods or chains should be employed and used in the navigation of steamboats, instead of wheel or tiller ropes.

This latter provision was wholly disregarded on board the vessel during the trip in question ; and the former also, as we have seen, for all practical or useful purposes.

We think there was great want of care, and which amounted to gross negligence, on the part of the respondents, in the stowage of the cotton ; especially, regarding its exposure to fire from the condition of the covering of the boiler-deck, and the casing of the steam-chimney. The former had been on fire on the previous trip, and a box of goods partly consumed. Also, for the want of proper furniture and equipments of the vessel, as required by the act of Congress, as well as by the most prudential considerations.

It is, indeed, difficult, on studying the facts, to resist the conclusion, that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity

that befell the vessel and nearly all on board, would have been arrested.

We are of opinion, therefore, that the respondents are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped.

Mr. Justice CATRON. — 1. In my judgment, the New Jersey Steam Navigation Company were entitled to all the benefits of Harnden's contract with them, in regard to the property of others with which he (Harnden) was intrusted, for the purpose of transporting it in his crate. And though the company can rely on all the defences which they could have relied upon if Harnden had sued them, still I think the libellants can maintain this suit.

Had a trover and conversion been made of the money sued for, or an open trespass been committed on it by throwing it overboard, by the servants or agents of the company, then either Harnden, the bailee of the bank, might have sued the company, or the bank might have sued. As to the right to sue, in the case put, by the bank, there can be no doubt; as such acts were never contemplated by the contract, nor covered by it.

The Navigation Company were responsible to Harnden (and to those who employed him,) notwithstanding the contract, for acts of gross negligence in transporting the property destroyed; as, for instance, if the servants of the company, in navigating the vessel, omitted to observe even slight diligence, and failed in the lowest degree of prudence, to guard against fire, then they must be deemed in a court of justice to have been guilty of gross negligence; by which expression I mean, that they acted reckless of consequences, as respected the safety of the vessel and the lives and property on board and in their charge, that such conduct was contrary to common honesty, and that the master and owners were liable for loss by reason of such recklessness; as they would have been in case of an affirmative and meditated fraud that had occasioned the same loss, and that this burning was a tort.

Whether it is evidence of fraud in fact, as Sir William Jones intimates, or whether it is not, as other writers on bailments declare, is not worthy of discussion. The question is this. Is the measure of liability the same where a ship is burned, because the master and crew did not observe the lowest degree of prudence to

prevent it, and in a case where she is *wilfully* burned? This is the question for our consideration. In the Civil Law, I apprehend no distinction in the cases put exists; nor do I believe any exists at Common Law. But by the laws of the United States, such gross and reckless negligence as that proved in the case before us, was a fraud and a tort on the shippers, and the fire that occurred, and consequent loss of life, a crime on the part of the master.

By the twelfth section of the act of 1838, chap. 191, every person employed on any steamboat or vessel, by whose negligence to his respective duty the life of any person shall be destroyed, shall be deemed guilty of manslaughter, and subject to conviction and imprisonment at hard labor for a time not exceeding ten years. (5 Statutes at Large, 306.) Here the legislature have put gross negligence in the category of crimes of a high grade, and of frauds of course; nor can this Court assume a less stringent principle, in a case of loss of property, than Congress has recognized as the true one, if life be destroyed by such negligence. From the facts before us, I feel warranted in saying, that, had the captain survived the destruction of the ship and the loss of many lives by the disaster, he would have been clearly guilty according to the twelfth section.

One single circumstance is decisive of the culpable negligence. By section ninth of the above act, it is made "the duty of the master and owner of every steamvessel employed on the sea, to provide, as a part of the necessary furniture, a suction-hose and fire-engine, and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order." This vessel had something of the kind; but it was in no order for use, and a mere delusion, and a sheer fraud on the law and the public. Had there been such an engine and hose, the fire could have been extinguished in all probability, as I apprehend.

2. There was only a single rigged bucket on board, and nothing else to reach the water with, and the money of libellants was thrown from the boxes, and they used to lift water.

3. The flue from the furnace ran through three decks, and was red-hot through the three decks, and the cotton was stowed within eighteen inches on all sides of this red-hot flue, and the bales pressed in, three tiers deep, from the boiler-deck to the next deck,

so that it would have been with much difficulty that the cotton could have been removed should a fire occur ; there the fire did occur, and the cotton was not removed, — wherefore the vessel was burnt. And from the mode of stowage a fire could hardly be avoided, and was to be expected and guarded against.

Mr. Justice DANIEL. — Having felt myself bound to treat at some extent what seemed to me the decisive, and what may, too, be called the public or constitutional question involved in this cause, — the question of jurisdiction, — as to what may be the merits of this controversy, the obligations sustained by the parties to each other, and the extent to which these have been fulfilled or violated ; I shall content myself with simply giving the conclusions to which my mind has been conducted, without pretending to reason them out fully upon the facts or the law of the case, because those conclusions would not be the grounds of a formal dissent, though disaffirmed by a majority of my brethren.

Whilst I am impressed with the strong necessity that exists for guarding against fraud or neglect in those who, by holding themselves forth as fitted to take charge of the lives, the health, or the property of the community, thereby invite the public trust and reliance, I am not prepared to say that there can be no limit or qualification to the responsibility of those who embark in these or similar undertakings, — limits which may be implied from the inherent nature of those undertakings themselves, or which may result from express stipulation. It seems to me undeniable, that a carrier may select the particular line or description of business in which he engages, and that, so long as he with good faith adheres to that description, he cannot be responsible for any thing beyond or inconsistent with it. The rule which makes him an insurer against every thing but the act of God or the public enemy, makes him an insurer as to performances only which are consistent with his undertaking as carrier. A common carrier of travellers is bound to the preservation of the accustomed baggage of the traveller, because of the known custom that travellers carry with them articles for their comfort and accommodation, and the price for which the transportation is undertaken is graduated on that presumption ; but the carrier would not therefore be responsible for other articles, of extraordinary value, secretly transported upon his vehicle,

because by this secrecy he is defrauded of a compensation commensurate with the value of the subject transported, and with the increased hazards to which it is attempted to commit him without his knowledge or assent. But to render him liable, he must have received the article for transportation, and it must be a subject falling fairly within the scope of his engagement. Within this range he is an insurer, with the exceptions above stated. But a carrier may, in a given case, be exempted from liability for loss, without fraud, by express agreement with the person for whom he undertakes; for I cannot well imagine a principle creating a disability in a particular class of persons to enter into a contract fraught with no criminal or immoral element, — a disability, indeed, extending injuriously to others, who might find it materially beneficial to make a contract with them. A carrier may also be exempted from liability by the conduct of the owner of property, in keeping the exclusive possession and control of it, and thereby withholding it from the care and management of the carrier. Upon applying the principles here succinctly stated to the evidence in this cause, it is not made out in proof, to my mind, that the respondents ever received, as carriers, from the libellants, or indeed in any other capacity, property of any species or description, or ever knew that property of the libellants was, directly or indirectly, within the possession of the respondents, or on board their vessel. It is not in proof that Harnden, in his contract with the respondents, acted as the agent of the libellants or for their benefit, or that, at the time of the agreement or of the shipment made by Harnden, the libellants and respondents were known to each other by transactions as shipper and carrier. It is established by proof, that Harnden contracted, in his own name and behalf alone, with the respondents for a separate compartment on board their vessel, to be, with its contents, (the latter unknown to the respondents,) at all times under his exclusive control; that the property alleged to have been lost was, if in this separate compartment, placed there without certain knowledge of its character or value on the part of the respondents, was under the exclusive direction of Harnden, who accompanied it, and who, up to the time of the conflagration of the vessel, held the property under lock and key, and could alone, without violence and a breach of the engagement, have had access to it. Were this controversy directly between Harnden

and the respondents, from the peculiar nature of the contract between these parties, and from the possession of the subject reserved to and exercised by the former, any liability of the respondents, even then, might be a matter of doubt; but there should, I think, be no difficulty in concluding that no kind of liability could attach to the respondents in favor of persons for whom they had undertaken no duty, and who, in reference to the transaction in question, were strangers, entirely unknown to them. Upon the merits of this case, as well as upon the question of jurisdiction, I think the decree of the Circuit Court ought to be reversed, and the libel dismissed.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the District of Rhode Island, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs, and damages at the rate of six per centum per annum.

Mr. Justice WOODBURY gave no opinion on the validity to the objections to a recovery by the plaintiff; but gave an elaborate and very learned opinion upon the strongly contested question of *admiralty jurisdiction.*

ACTS OF THE CONGRESS OF THE UNITED STATES REGULATING THE CARRIAGE OF PASSENGERS IN MERCHANT VESSELS, ETC.

Act of 1847, Chap. 16.

An Act to regulate the carriage of passengers in merchant vessels: February 22, 1847. [See *ante*, § 626–629.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if the master of any vessel owned in whole or in part by a citizen of the United States of America, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them and appropriated for their use, and unoccupied by stores, or other goods, not being the personal luggage of such passengers, that is to say, on the lower deck or platform one passenger for every fourteen clear superficial feet of deck, if such vessel is not to pass within the tropics during such voyage; but if such vessel is to pass within the tropics during such voyage, then one passenger for every twenty such clear superficial feet of deck, and on the orlop deck (if any) one passenger for every thirty such superficial feet in all cases, with intent to bring such passengers to the United States of America, and shall leave such port or place with the same, and bring the same or any number thereof, within the jurisdiction of the United States aforesaid, or if any such master of vessel shall take on board of his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proportions aforesaid admit, with intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any circuit or district Court of the United States aforesaid, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and may also be imprisoned for any term not exceeding one year: *Provided*,

That this act shall not be construed to permit any ship or vessel to carry more than two passengers to five tons of such ship or vessel.

SEC. 2. *And be it further enacted*, That if the passengers so taken on board of such vessel, and brought into or transported from the United States aforesaid, shall exceed the number limited by the last section to the number of twenty in the whole, such vessel shall be forfeited to the United States aforesaid, and be prosecuted and distributed as forfeitures are under the act to regulate duties on imports and tonnage.

SEC. 3. *And be it further enacted*, That if any such vessel as aforesaid shall have more than two tiers of berths, or in case, in such vessel, the interval between the floor and the deck or platform beneath shall not be at least six inches, and the berths well constructed, or in case the dimensions of such berths shall not be at least six feet in length, and at least eighteen inches in width, for each passenger as aforesaid, then the master of said vessel, and the owners thereof, severally, shall forfeit and pay the sum of five dollars for each and every passenger on board of said vessel on such voyage, to be recovered by the United States as aforesaid, in any Circuit or District Court of the United States where such vessel may arrive, or from which she sails.

SEC. 4. *And be it further enacted*, That, for the purposes of this act, it shall in all cases be computed that two children, each being under the age of eight years, shall be equal to one passenger, and that children under the age of one year shall not be included in the computation of the number of passengers.

SEC. 5. *And be it further enacted*, That the amount of the several penalties imposed by this act shall be liens on the vessel or vessels violating its provisions; and such vessel may be libelled and sold therefor in the District Court of the United States aforesaid in which such vessel shall arrive. *Approved, February* 22, 1847.

ACT OF 1848, CHAP. 41.

An Act to provide for the ventilation of passenger vessels, and for other purposes: May 17, 1848.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all vessels,

whether of the United States or any other country, having sufficient capacity according to law for fifty or more passengers, (other than cabin passengers,) shall, when employed in transporting such passengers between the United States and Europe, have on the upper deck, for the use of such passengers, a house over the passage-way leading to the apartment allotted to such passengers below deck, firmly secured to the deck, or combings of the hatch, with two doors, the sills of which shall be at least one foot above the deck, so constructed that one door or window in such house may, at all times, be left open for ventilation; and all vessels so employed, and having the capacity to carry one hundred and fifty such passengers, or more, shall have two such houses; and the stairs or ladder leading down to the aforesaid apartment shall be furnished with a hand-rail of wood or strong rope: *Provided, nevertheless*, Booby hatches may be substituted for such houses in vessels having three permanent decks.

Sec. 2. *And be it further enacted*, That every such vessel so employed, and having the legal capacity for more than one hundred such passengers, shall have at least two ventilators to purify the apartment or apartments occupied by such passengers; one of which shall be inserted in the after part of the apartment or apartments, and the other shall be placed in the forward portion of the apartment or apartments, and one of them shall have an exhausting cap to carry off the foul air, and the other a receiving cap to carry down the fresh air; which said ventilators shall have a capacity proportioned to the size of the apartment or apartments to be purified; namely, if the apartment or apartments will lawfully authorize the reception of two hundred such passengers, the capacity of such ventilators shall each of them be equal to a tube twelve inches diameter in the clear, and in proportion for larger or smaller apartments; and all said ventilators shall rise at least four feet six inches above the upper deck of any such vessel, and be of the most approved form and construction: *Provided*, That if it shall appear, from the report to be made and approved, as provided in the seventh section of this act, that such vessel is equally well ventilated by any other means, such other means of ventilation shall be deemed, and held to be, a compliance with the provisions of this section.

Sec. 3. *And be it further enacted*, That every vessel carrying more than fifty such passengers shall have for their use on deck,

housed and conveniently arranged, at least one camboose or cooking range, the dimensions of which shall be equal to four feet long and one foot six inches wide for every two hundred passengers; and provisions shall be made in the manner aforesaid in this ratio for a greater or less number of passengers: *Provided, however*, And nothing herein contained shall take away the right to make such arrangements for cooking between decks, if that shall be deemed desirable.

SEC. 4. *And be it further enacted*, That all vessels employed as aforesaid shall have on board, for the use of such passengers, at the time of leaving the last port whence such vessel shall sail, well secured under deck, for each passenger, at least fifteen pounds of good navy bread, ten pounds of rice, ten pounds of oatmeal, ten pounds of wheat flour, ten pounds of peas and beans, thirty-five pounds of potatoes, one pint of vinegar, sixty gallons of fresh water, ten pounds of salted pork, free of bone, all to be of good quality, and a sufficient supply of fuel for cooking; but at places where either rice, oatmeal, wheat flour, or peas and beans cannot be procured, of good quality and on reasonable terms, the quantity of either or any of the other last-named articles may be increased and substituted therefor; and in case potatoes cannot be procured on reasonable terms, one pound of either of said articles may be substituted in lieu of five pounds of potatoes, and the captains of such vessels shall deliver to each passenger at least one tenth part of the aforesaid provisions weekly, commencing on the day of sailing, and daily at least three quarts of water, and sufficient fuel for cooking; and if the passengers on board of any such vessel in which the provisions, fuel, and water herein required shall not have been provided as aforesaid, shall at any time be put on short allowance during any voyage, the master or owner of any such vessel shall pay to each and every passenger who shall have been put on short allowance the sum of three dollars for each and every day they may have been on such short allowance, to be recovered in the Circuit or District Court of the United States: *Provided, nevertheless*, And nothing herein contained shall prevent any passenger, with the consent of the captain, from furnishing for himself the articles of food herein specified; and, if put on board in good order, it shall fully satisfy the provisions of this act so far as regards food: *And provided further*, That any passenger may also, with

the consent of the captain, furnish for himself an equivalent for the articles of food required in other and different articles; and if, without waste or neglect on the part of the passenger, or inevitable accident, they prove insufficient, and the captain shall furnish comfortable food to such passengers during the residue of the voyage, this, in regard to food, shall also be a compliance with the terms of this act.

Sec. 5. *And be it further enacted*, That the captain of any such vessel so employed, is hereby authorized to maintain good discipline, and such habits of cleanliness among such passengers, as will tend to the preservation and promotion of health; and to that end, he shall cause such regulations as he may adopt for this purpose, to be posted up, before sailing, on board such vessel, in a place accessible to such passengers, and shall keep the same so posted up during the voyage; and it is hereby made the duty of said captain to cause the apartment occupied by such passengers to be kept, at all times, in a clean, healthy state, and the owners of every such vessel so employed are required to construct the decks, and all parts of said apartment, so that it can be thoroughly cleansed; and they shall also provide a safe, convenient privy or water-closet for the exclusive use of every one hundred such passengers. And when the weather is such that said passengers cannot be mustered on deck with their bedding, it shall be the duty of the captain of every such vessel to cause the deck occupied by such passengers to be cleaned [cleansed] with chloride of lime, or some other equally efficient disinfecting agent, and also at such other times as said captain may deem necessary.

Sec. 6. *And be it further enacted*, That the master and owner or owners of any such vessel so employed, which shall not be provided with the house or houses over the passage-ways, as prescribed in the first section of this act; or with ventilators, as prescribed in the second section of this act; or with the cambooses or cooking ranges, with the houses over them, as prescribed in the third section of this act; shall severally forfeit and pay to the United States the sum of two hundred dollars for each and every violation of, or neglect to conform to, the provisions of each of said sections; and fifty dollars for each and every neglect or violation of any of the provisions of the fifth section of this act; to be recovered by suit in any Circuit or District Court of the United States, within the jurisdiction of

which the said vessel may arrive, or from which it may be about to depart, or at any place within the jurisdiction of such Courts, wherever the owner or owners, or captain of such vessel may be found.

SEC. 7. *And be it further enacted*, That the collector of the customs, at any port in the United States at which any vessel so employed shall arrive, or from which any such vessel shall be about to depart, shall appoint and direct one of the inspectors of the customs for such port to examine such vessel, and report in writing to such collector whether the provisions of the first, second, third, and fifth sections of this act have been complied with in respect to such vessel; and if such report shall state such compliance, and be approved by such collector, it shall be deemed and held as conclusive evidence thereof.

SEC. 8. *And be it further enacted*, That the first section of the act entitled "An act to regulate the carriage of passengers in merchant vessels," approved February twenty-second, eighteen hundred and forty-seven, be so amended that, when the height or distance between the decks of the vessels referred to in the said section shall be less than six feet, and not less than five feet, there shall be allowed to each passenger sixteen clear superficial feet on the deck, instead of fourteen, as prescribed in said section; and if the height or distance between the decks shall be less than five feet, there shall be allowed to each passenger twenty-two clear superficial feet on the deck; and if the master of any such vessel shall take on board his vessel, in any port of the United States, a greater number of passengers than is allowed by this section, with the intent specified in said first section of the act of eighteen hundred and forty-seven, or if the master of any such vessel shall take on board at a foreign port, and bring within the jurisdiction of the United States, a greater number of passengers than is allowed by this section, said master shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished in the manner provided for the punishment of persons convicted of a violation of the act aforesaid; and in computing the number of passengers on board such vessels, all children under the age of one year, at the time of embarkation, shall be excluded from such computation.

SEC. 9. *And be it further enacted*, That this act shall take effect, in respect to such vessels sailing from ports in the United States, in

thirty days from the time of its approval; and in respect to every such vessel sailing from ports in Europe, in sixty days after such approval; and it is hereby made the duty of the Secretary of State to give notice, in the ports of Europe, of this act, in such manner as he may deem proper.

SEC. 10. *And be it further enacted*, That so much of the first section of the act entitled "An act regulating passenger ships and vessels," approved March second, eighteen hundred and nineteen, or any other act that limits the number of passengers to two for every five tons, is hereby repealed. *Approved*, May 17, 1848.

ACT OF 1849, CHAP. 111.

An Act to extend the provisions of all laws now in force relating to the carriage of passengers in merchant vessels, and the regulation thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all vessels bound from any port in the United States to any port or place in the Pacific Ocean, or on its tributaries, or from any such port or place to any port in the United States on the Atlantic or its tributaries, shall be subject to the provisions of all the laws now in force relating to the carriage of passengers in merchant vessels, sailing to and from foreign countries, and the regulation thereof; except the fourth section of the "Act to provide for the ventilation of passenger vessels, and for other purposes," approved May seventeenth, eighteen hundred and forty-eight, relating to provisions, water, and fuel; but the owners and masters of all such vessels shall in all cases furnish to each passenger the daily supply of water therein mentioned, and they shall furnish, or cause the passengers to furnish for themselves, a sufficient supply of good and wholesome food; and in case they shall fail so to do, or shall provide unwholesome or unsuitable provisions, they shall be subject to the penalty provided in said fourth section in case the passengers are put on short allowance of water or provisions.

SEC. 2. *And be it further enacted*, That the act entitled "An Act to regulate the carriage of passengers in merchant vessels,"

approved February twenty-second, eighteen hundred and forty-seven, shall be so amended as that a vessel passing into or through the *tropics* shall be allowed to carry the same number of passengers as vessels that do not enter the tropics.

SEC. 3. *And be it further enacted*, That this act shall take effect on and after the fifteenth day of March, eighteen hundred and forty-nine. *Approved*, *March* 3, 1849.

ACTS OF THE CONGRESS OF THE UNITED STATES FOR THE SAFETY OF PASSENGERS ON BOARD OF STEAM VESSELS.

Act of 1838, Chap. 191.

An Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of all owners of steamboats, or vessels propelled in whole or in part by steam, on or before the first day of October, one thousand eight hundred and thirty-eight, to make a new enrolment of the same, under the existing laws of the United States, and take out from the collector or surveyor of the port, as the case may be, where such vessel is enrolled, a new license, under such conditions as are now imposed by law, and as shall be imposed by this act.

Sec. 2. *And be it further enacted*, That it shall not be lawful for the owner, master, or captain of any steamboat or vessel, propelled in whole or in part by steam, to transport any goods, wares, and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, from and after the said first day of October, one thousand eight hundred and thirty-eight; without having first obtained, from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any District Court of the United States having jurisdiction of the offence.

Sec. 3. *And be it further enacted*, That it shall be the duty of the District Judge of the United States, within whose district any

ports of entry or delivery may be, on the navigable waters, bays, lakes, and rivers of the United States, upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by steam, to appoint, from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam-engines, steamboat boilers, or other machinery belonging to steam-vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection; such persons, before entering upon the duties enjoined by this act, shall make and subscribe an oath or affirmation before said District Judge, or other officer duly authorized to administer oaths, well, faithfully, and impartially to execute and perform the services herein required of them.

Sec. 4. *And be it further enacted*, That the person or persons who shall be called upon to inspect the hull of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, give to the owner or master, as the case may be, a certificate, in which shall be stated the age of the said boat or vessel, when and where originally built, and the length of time the same has been running. And he or they shall also state whether, in his or their opinion, the said boat or vessel is sound, and in all respects seaworthy, and fit to be used for the transportation of freight or passengers; for which service, so performed upon each and every boat or vessel, the inspectors shall each be paid and allowed, by said master or owner applying for such inspection, the sum of five dollars.

Sec. 5. *And be it further enacted*, That the person or persons who shall be called upon to inspect the boilers and machinery of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, make a certificate, in which he or they shall state his or their opinion whether said boilers are sound and fit for use, together with the age of said boilers; and duplicates thereof shall be delivered to the owner or master of such vessel, one of which it shall be the duty of the said master and owner to deliver to the collector or surveyor of the port whenever he shall apply for a license, or for a renewal of a license; the other he shall cause to be posted up, and kept in some conspicuous part

of said boat, for the information of the public; and for each and every inspection so made, each of the said inspectors shall be paid, by the said master or owner applying, the sum of five dollars.

Sec. 6. *And be it further enacted*, That it shall be the duty of the owners and masters of steamboats to cause the inspection provided under the fourth section of this act to be made at least once in every twelve months; and the examination required by the fifth section, at least once in every six months; and deliver to the collector or surveyor of the port where his boat or vessel has been enrolled or licensed, the certificate of such inspection; and, on failure thereof, he or they shall forfeit the license granted to such boat or vessel, and be subject to the same penalty as though he had run said boat or vessel without having obtained such license, to be recovered in like manner. And it shall be the duty of the owners and masters of the steamboats licensed in pursuance of the provisions of this act, to employ on board of their respective boats a competent number of experienced and skilful engineers; and, in case of neglect to do so, the said owners and masters shall be held responsible for all damages to the property of any passenger on board of any boat occasioned by an explosion of the boiler, or any derangement of the engine or machinery of any boat.

Sec. 7. *And be it further enacted*, That whenever the master of any boat or vessel, or the person or persons charged with navigating said boat or vessel, which is propelled in whole or in part by steam, shall stop the motion or headway of said boat or vessel, or when said boat or vessel shall be stopped for the purpose of discharging or taking in cargo, fuel, or passengers, he or they shall open the safety-valve, so as to keep the steam down in said boiler as near as practicable to what it is when the said boat or vessel is under headway, under the penalty of two hundred dollars for each and every offence.

Sec. 8. *And be it further enacted*, That it shall be the duty of the owner and master of every steam-vessel engaged in the transportation of freight or passengers, at sea, or on the Lakes Champlain, Ontario, Erie, Huron, Superior, and Michigan, the tonnage of which vessel shall not exceed two hundred tons, to provide and to carry with the said boat or vessel, upon each and every voyage, two long-boats or yawls, each of which shall be competent to carry at least twenty persons; and where the tonnage of said vessel shall

exceed two hundred tons, it shall be the duty of the owner and master to provide and carry, as aforesaid, not less than three long-boats or yawls, of the same or larger dimensions; and for every failure in these particulars, the said master and owner shall forfeit and pay three hundred dollars.

Sec. 9. *And be it further enacted*, That it shall be the duty of the master and owner of every steam-vessel employed on either of the lakes mentioned in the last section, or on the sea, to provide, as a part of the necessary furniture, a suction-hose and fire-engine and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order; and that iron rods or chains shall be employed and used in the navigating of all steamboats, instead of wheel or tiller ropes; and for a failure to do which, they, and each of them, shall forfeit and pay the sum of three hundred dollars.

Sec. 10. *And be it further enacted*, That it shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars.

Sec. 11. *And be it further enacted*, That the penalties imposed by this act may be sued for and recovered in the name of the United States, in the District or Circuit Court of such district or circuit where the offence shall have been committed, or forfeiture incurred, or in which the owner or master of said vessel may reside, one half to the use of the informer, and the other to the use of the United States; or the said penalty may be prosecuted for by indictment in either of the said Courts.

Sec. 12. *And be it further enacted*, That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel, propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any Circuit Court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years.

Sec. 13. *And be it further enacted*, That in all suits and actions against proprietors of steamboats, for injuries arising to person or

property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam, shall be taken as full *prima facie* evidence, sufficient to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment. *Approved, July* 7, 1838.

ACT OF 1843, CHAP. 94.

An act to modify the act entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," approved July seventh, eighteen hundred and thirty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That every boat or vessel which existing laws require to be registered, and which is propelled in whole or in part by steam, shall be provided with such additional apparatus or means as, in the opinion of the inspector of steamboats, shall be requisite to steer the boat or vessel, to be located in such part of the boat or vessel as the inspector may deem best to enable the officers and crew to steer and control the boat or vessel, in case the pilot or man at the wheel is driven from the same by fire; and no boat or vessel, exclusively propelled by steam, shall be registered, after the passage of this act, unless the owner, master, or other proper person, shall file with the collector or other proper officer the certificate of the inspector, stating that suitable means have been provided to steer the boat or vessel, in case the pilot or man at the wheel is driven therefrom by fire.

SEC. 2. *And be it further enacted*, That it shall be lawful in all vessels or boats propelled in whole or in part by steam, and which shall be provided with additional apparatus or means to steer the same, as required by the first section of this act, to use wheel or tiller ropes, composed of hemp or other good and sufficient material, around the barrel or axle of the wheel, and to a distance not exceeding twenty-two feet therefrom, and also in connecting the tiller or rudder yoke with iron rods or chains used for working the rudder: *Provided*, That no more rope for this purpose shall be

used than is sufficient to extend from the connecting points of the tiller or rudder yoke placed in any working position beyond the nearest blocks or rollers, and give sufficient play to work the ropes on such blocks or rollers: *And provided, further*, That there shall be chains extending the whole distance of the ropes, so connected with the tiller or rudder yoke, and attached or fastened to the tiller or rudder yoke and the iron chains or rods extending towards the wheel, in such manner as will take immediate effect, and work the rudder in case the ropes are burnt or otherwise rendered useless.

Sec. 3. *And be it further enacted*, That the master and owner, and all others interested in vessels navigating Lakes Champlain, Ontario, Erie, Huron, Superior, and Michigan, or any of them, and which are propelled by sails and Erickson's propeller, and used exclusively in carrying freight, shall from and after the passage of this act be exempt from liability or fine for failing to provide, as a part of the necessary furniture of such vessel, a suction hose and fire-engine and hose suitable to be worked on such vessel in case of fire, or more than one long-boat or yawl.

Sec. 4. *And be it further enacted*, That it shall be lawful for the court before which any suit, information, or indictment is or shall be pending for the violation, before the passage of this act, of so much of the ninth section of the act aforesaid, as requires "that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel and tiller ropes," to order such suit, information, or indictment to be discontinued, on such terms as to costs as the Court shall judge to be just and reasonable: *Provided*, That the defendant or defendants in such prosecution shall cause it to appear, by affidavit or otherwise, to the satisfaction of the court, that he or they had failed to use iron rods or chains in the navigation of his or their boat or boats, from a well-grounded apprehension that such rods or chains could not be employed for the purpose aforesaid with safety.

Sec. 5. *And be it further enacted*, That in execution of the authority vested in him by the second section of the joint resolution, "authorizing experiments to be made for the purpose of testing Samuel Colt's sub-marine battery and for other purposes," approved August thirty-first, one thousand eight hundred and forty-two, the secretary of the navy shall appoint a board of examiners, consisting of three persons, of thorough knowledge as to the structure and use

of the steam-engine, whose duty it shall be to make experimental trials of such inventions and plans designed to prevent the explosion of steam boilers and collapsing of flues, as they may deem worthy of examination, and report the result of their experiments, with an expression of their opinion as to the relative merits and efficacy of such inventions and plans; which report the secretary shall cause to be laid before Congress, at its next session. It shall also be the duty of said examiners to examine and report the relative strength of copper and iron boilers of equal thickness, and what amount of steam to the square inch each, when sound, is capable of working with safety; and whether hydrostatic pressure, or what other plan is best for testing the strength of boilers under the inspection laws; and what limitations as to the force or pressure of steam to the square inch, in proportion to the ascertained capacity of a boiler to resist, it would be proper to establish by law for the more certain prevention of explosions.

Sec. 6. *And be it further enacted*, That so much of the act aforesaid as is inconsistent with the provisions of this act shall be, and the same is hereby repealed. *Approved*, *March* 3, 1843.

FORM OF A LIBEL IN A SUIT *IN REM* IN CASES OF COLLISION OF VESSELS UPON THE LAKES.

Libel in a suit *in rem*, for damages by collision, under the Act of February 26, 1845, "extending the jurisdiction of the District Courts of the United States to certain cases upon the lakes and navigable waters connecting the same."

In Admiralty.

To the Judge of the District Court of the United States for the District of ——.

A. B. of ——, ——, owner of the schooner Sylph hereinafter mentioned, exhibits this his Libel against the steamboat Vixen, (whereof C. D. is or lately was master,) now lying in the port of —— in the district of —— aforesaid, and within the Admiralty and Maritime jurisdiction of this Honorable Court; her engine, machinery, boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That the said schooner Sylph is a vessel of more than twenty tons burthen, to wit, of the burthen of —— tons or thereabouts; and at the time when the cause of action hereinafter mentioned and set forth, arose, was enrolled and licensed for the coasting trade, and was employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters connecting the said lakes.

Second. That on the —— day of —— in the year ——, the aforesaid schooner, being tight, stanch, and well manned and provided, sailed from the port of Sandusky in the State of Ohio, with a valuable cargo of wheat, on a voyage to the port of Buffalo in the State of New York.

Third. That during the said voyage, to wit, about eleven P. M. of the —— day of ——, the said schooner being then about eight miles westerly from Cleveland, with the wind blowing hard from the east-southeast, and the said schooner being close hauled on the starboard tack, her course lying east-northeast, R. T. the first mate of the said schooner, who then had the watch and was the commanding officer on deck, being on the lookout, descried lights ahead,

and soon after discovered that they were borne by a steamboat approaching the said schooner in a southwesterly direction, apparently about one mile distant, and then bearing about one point on her lea bow. That as soon as the said R. T. mate as aforesaid, had discovered the approach of the said steamboat, he informed the helmsman of the said schooner thereof, and ordered him to keep her steady, believing that the said steamboat would pass her on the larboard hand. That about three minutes after the said order was given, it became apparent to the said mate that there was ground to apprehend a collision with the said steamboat; and within one or two minutes thereafter, he became satisfied that such collision was inevitable, unless proper means were immediately resorted to by the persons having charge of the said steamboat, to prevent the threatened disaster. Whereupon, the said steamboat having in the mean time approached within speaking distance, the said R. T. mate as aforesaid, instantly shouted "Port your helm! Stop your engine!" and several times repeated this request, and continued to do so, in a loud and audible voice, until, about a minute and a half after first hailing the said steamboat, she struck the said schooner, stem on, on her larboard bow, and so greatly injured the said schooner that she immediately began to fill with water, and, in spite of the most strenuous exertion on the part of all on board to keep her afloat, she soon thereafter sunk, and was, with her cargo, totally lost; her officers and crew having, with difficulty saved their lives, by getting on board the said steamboat.

Fourth. That the said steamboat by which the said damage had been done, proved to be the Vixen aforesaid, under the command of G. H. as master thereof, and being of about —— tons burthen, bound on a voyage from Buffalo aforesaid to Detroit. That at the time when her lights were first discovered from the Sylph as hereinbefore mentioned, the Sylph carried a light suspended from the outer end of her bowsprit, which remained there until she was struck by the Vixen; and although there was considerable haze on the water, the said light could easily have been seen, and, if she kept a good lookout, must have been seen by her at the distance of half a mile, or at least of a quarter of a mile, and in season to have enabled her to give way for the said Sylph as she was bound to do, and thereby to prevent a collision therewith.

Fifth. That if, at the time the said Vixen was first hailed from the Sylph, and thenceforth, she had had a proper watch on deck,

the warning given by the mate of the Sylph as hereinbefore mentioned must have been distinctly heard on board the Vixen in season to have enabled her, by putting her helm to port, to pass the Sylph in safety; or, by immediately stopping her engine, greatly to diminish the violence of the blow. But instead of so doing, the said steamboat Vixen kept on her previous course; and although she was running at the rate of twelve knots an hour, her speed was not slackened; and the aforesaid G. H. master of the said Vixen, admitted to the aforesaid R. T. mate of the Sylph, soon after the said R. T. got on board the Vixen, that her engine had not been stopped.

Sixth. That at the time when the danger of a collision between the said vessels was first perceived as aforesaid from the Sylph, it was impossible for her to get out of the way of the said Vixen; nor were there any means to which she could with propriety have resorted, for that purpose.

Seventh. That at the time of the aforementioned loss of the said schooner Sylph and her cargo, the libellant was the true and lawful owner of the said schooner, and of her said cargo; and that the said schooner was of the value of —— dollars, and the said cargo was of the value of —— dollars or thereabouts; and that by reason of the careless, negligent, unskilful, and improper management of the said steamboat Vixen, and of the collision thereby occasioned of the said steamboat with the said schooner Sylph, the libellant hath sustained damages to the amount of —— dollars or thereabouts, for which he claims reparation in this suit.

Eighth. That all and singular the premises are true.

Wherefore the libellant prays that process in due form of law may issue against the said steamboat, her engine, machinery, boats, tackle, apparel, and furniture; and that this Honorable Court will pronounce for the damages aforesaid, and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain, and the Court is competent to give in the premises.

(Signed) A. B. *Libellant.*

G. H. *Proctor.*

On the —— day of ——, appeared personally
A. B. the above named libellant, and was
sworn to the truth of the foregoing libel.
Before me J. K. *Clerk* [or *Commissioner*].

For damage by collision, a suit *in rem* and *in personam* against the offending ship and the master, or a suit *in personam* against the master or the owner, may also be maintained ; and there can be little difficulty in adapting the foregoing precedent to either of these forms of remedy.

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